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This report contains digests of 1967 court decisions dealing with legal and constitutional issues concerning students in public schools, parochial schools, and public institutions of higher education. All levels of the State and Federal judiciary systems are represented by the decisions. The 88 case digests are arranged under the following topic headings: (1) Admission and attendance, (2) school desegregation, (3) pupil injury, (4) religion/sectarian education, (5) transportation, and (6) miscellaneous. Forty-two school desegregation decisions coupled with 20 decisions on pupil injury cases account for over 70% of the 88 reported cases. A title index to the cases is also provided. Court litigation affecting teachers in 1967 and State school legislation in 1968 are the topics of related documents EA 002 375 and EA 002 377. (JH)

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School Law Series

RESEARCH REPORT 1968-R10

The Pupil's Day in Court: Review of 1967

An Annual Compilation

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FOREWORD

The role of the courts in settling controversies and in the process shaping the course of many facets of the educational enterprise is clearly reflected in the judicial decisions handed down in 1967. For this reason, those engaged in education or promoting the cause of education will be interested in the contents of this report. Included are significant recent opinions concerned with acceleration of school desegregation, correction of racial imbalance, judicial pronouncements on church-state issues as they pertain to the free distribution of textbooks to parochial-school pupils, the right of a taxpayer to challenge the use of federal funds for materials and programs for children in sectarian schools, and on a variety of other legal issues involving the rights of pupils.

This annual compilation is the 26th in a series released by the NEA Research Division since 1942. This latest issue contains digests of published decisions of state and federal courts in cases relating to pupils.

This report was prepared by Frieda S. Shapiro, Assistant Director, with the assistance of Julian L. Ridlen, formerly with the Research Division as a research assistant.

GLEN ROBINSON
Director, Research Division

INTRODUCTION

This report contains digests of 88 judicial decisions of direct concern to pupils in the public schools and to students in higher education institutions supported by public funds, as well as to parochial-school pupils, for among these digests are decisions with issues of the legality of providing services to such pupils at public expense. The digests were compiled from court decisions published in the National Reporter System during the calendar year 1967.

The 88 decisions reported here cover court actions from 29 states and the District of Columbia, with all but one of these decisions from actions of a civil nature. The exception was a New Jersey case where parents providing home instruction for their child successfully appealed a conviction for violating the compulsory school attendance law. The state courts are represented with 43 decisions, of which 20 came from the highest court in the state where the action began, 16 were from intermediate state appellate courts, and seven were from trial courts. The federal judiciary produced 45 decisions, 21 of them in the circuit courts of appeal and 24 in federal district courts. While the Supreme Court of the United States handed down no decisions in 1967 on issues involving pupils, the Court accepted appeals in six cases included in this report. The disposition of these cases is discussed below. Although slightly over four-fifths of the federal decisions relate to school desegregation, eight of the 45 federal court decisions are concerned with a variety of other questions.

The case digests in this compilation are classified under six headings: (a) admission and attendance, (b) school desegregation, (c) pupil injury, (d) religion; sectarian education, (e) transportation, and (f) miscellaneous. The decisions are arranged by state under each topic; within states they are listed alphabetically by case title. Table 1 lists the decisions by the major issue raised.

School desegregation--As has been the pattern in previous years, in 1967 school desegregation again far exceeded any other issue litigated by pupils. Of the 88 decisions included here, 42 were related to school desegregation, and all but five of them were rendered in the federal courts. These decisions in no way reflect the continuing large volume of court concern with desegregation matters or the number of school systems involved. For example, two of the 1967 decisions alone consolidated lawsuits against 17 separate school systems. Moreover, numerous cases heard and decided during 1967 have not appeared as published decisions during the 1967 calendar year in the National Reporter System. For information on other decisions, proceedings, and orders not covered in this compilation, readers are directed to the Race Relations Law Reporter, published by the Vanderbilt University School of Law.

The 42 decisions on school desegregation contained in this report extend over 20 states, among them these states outside the south: Indiana, Massachusetts, Michigan, New Jersey, New York, Ohio, and Pennsylvania. In the states just named, the court challenges came from two directions: (a) from Negro pupils who sought relief from de facto school segregation, and (b) from white pupils and their parents contesting the constitutionality of state law or school-board action to correct racial imbalance in the public schools stemming from neighborhood housing patterns.

The action by Negro pupils in the Cincinnati schools illustrates the first type of challenge. In a decision which the Supreme Court of the United States declined to review, the U. S. Court of Appeals for the Sixth Circuit ruled that the Cincinnati school board had no constitutional duty to bus Negro or white children, to transfer classes, or to select new school sites for the sole purpose of alleviating racial imbalance that the school board did not cause. This view already had judicial precedent. In another decision, Pennsylvania's Supreme Court construed the state Human Relations Act to mean that school districts have a duty to take corrective measures to deal with de facto school segregation.

Representative of the second type of challenge was the appeal by white parents from a judgment dismissing their action for declaratory relief and an injunction against the Buffalo, New York, school system to prevent it from executing a pupil placement plan to correct de facto segregation. The parents argued that the plan was unconstitutional because it was based on proscribed racial classifications. The U. S. Circuit Court of Appeals for the Second

Circuit rejected this argument and held that the adopted plan did not violate any constitutional rights of the complaining parents. This holding is consistent with other decided cases. In another instance, the Boston school committee brought an action against the state board of education, contesting the constitutionality of the 1965 Massachusetts racial balance act. Under this act, racial imbalance is deemed to exist when the percent of nonwhite pupils exceeds 50 percent of a school's total enrollment. Local school boards are required to submit annual statistics to the state board of education on the number of white and nonwhite pupils in each school, and if racial imbalance exists, to prepare a plan to correct the situation. The Massachusetts Supreme Court upheld the 1965 act against contentions that it violated the due process clause of the Fourteenth Amendment and provisions of the state constitution because of vagueness in that the act contained no criteria for classifying the pupils as white or nonwhite, and because the act failed to grant a hearing to the local school board.

Trial and appellate courts in cases involving school systems which originally operated under state-imposed segregation were asked to give relief from racially discriminatory practices in pupil and teacher assignments, and in programs and facilities; to accelerate the pace of desegregation during the transition from a dual to a unitary nonracial school system; to pass on the adequacy and effectiveness of plans utilized to achieve desegregation; and to determine the constitutionality as well as the weight to be given by the courts to the desegregation guidelines of the U. S. Department of Health, Education, and Welfare to meet the requirements of the 1964 Civil Rights Act. All of these issues are treated in the significant, comprehensive, and widely cited decision of the U. S. Circuit Court of Appeals for the Fifth Circuit in United States v. Jefferson County Board of Education (372 F. (2d) 836, December 29, 1966). This opinion, with a clarifying statement and changes in the decree, was adopted on rehearing En Banc (380 F. (2d) 385, March 29, 1967). This appellate court not only upheld the constitutionality of the HEW guidelines, but held also that in determining whether school desegregation plans meet the constitutional standards in Brown and other Supreme Court decisions, that the district courts in the Fifth Circuit should give great weight to the minimum standards set forth in the guidelines. But the court noted, too, that school boards could not, by giving up federal aid, avoid the affirmative constitutional duty they have to reorganize their school systems by integrating students, faculties, facilities, and activities. Further, the appellate court considered freedom of choice plans which the guidelines and judicial decisions have recognized as a permissible means of desegregation. It found that as presently administered freedom of choice plans have serious shortcomings and set out specific elements to make this type of plan effective in disestablishing a dual school system.

The Supreme Court of the United States refused to grant certiorari for a review of the Jefferson decision to the school boards concerned. But the Court accepted appeals from Negro pupils in three 1967 cases from Virginia, Arkansas, and Tennessee and delivered separate opinions in each of them on May 27, 1968. The common issue in these cases was whether the freedom of choice school desegregation plan in the school systems named in the Virginia and Arkansas suits and the free transfer plan used by the City of Jackson and Madison County, Tennessee, constituted adequate compliance with a school board's responsibility under the second Brown decision to disestablish a dual school system.

In Green v. County School Board of New Kent County, Virginia, (36 U. S. Law Week 4476) the Supreme Court held that under the circumstances of the case, the freedom of choice plan was unacceptable as a sufficient step for dismantling the dual school system because in the three years of its operation no single white child attended a Negro school and 85 percent of the Negro children still attended the all-Negro school. The Court made it clear that it did not hold that a freedom of choice plan might of itself be unconstitutional, but that all it was deciding was that in desegregating a school system, a plan utilizing freedom of choice was not an end in itself. School boards, the Court said, have the responsibility to dismantle dual school systems and to come forward with plans that realistically work now; and district courts have the obligation to assess the effectiveness of a proposed plan in achieving desegregation in the light of circumstances present and options available in each instance. Since the freedom of choice plan in the New Kent County, Virginia, school system operated to burden children and their parents with the responsibility the Brown II decision squarely placed on the school board, the Court held that the board must be required to formulate a new plan, and in the light of other options open to it, such as zoning, fashion steps "which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." The Supreme Court applied the principles in this opinion to test the adequacy of the plans in the Arkansas and Tennessee cases, and considering the circumstances in each, judged their plans to be inadequate to convert their dual school systems into unitary, nonracial school systems.

Also to be noted is Hobson v. Hansen, wherein the federal district court ruled that the school authorities in the operation of the District of Columbia schools unconstitutionally deprived Negro and poor public-school children of their rights to equal educational opportunity. To correct the racial and economic discrimination found to exist in the operation of this system the court ordered the abolition of the track system, abolition of optional attendance zones, the provision of free transportation to volunteering children from overcrowded Negro schools to underpopulated predominantly white schools, substantial faculty integration beginning with the 1967-68 school year, and the filing of plans for pupil assignment and for a fully integrated faculty in each school.

Pupil injury--In 1967, as in years past, pupil injury produced considerable litigation. The 20 decisions under this topic came from 12 states. Governmental immunity as a defense against tort liability of school districts was challenged without success in Kentucky and Pennsylvania. The courts in these states followed the prevailing judicial view. Nor would the Pennsylvania Supreme Court, in a suit brought against the school district by a pupil injured in an assault by a gang of rowdies while he was leaving the school, accept the contention that since such criminal incidents occurred frequently at the school, the inaction of the school district was tantamount to maintenance of a nuisance, and, therefore, the immunity rule was not applicable.

In Florida, however, where governmental immunity protects school districts from tort liability, the Florida Supreme Court held valid a special act authorizing an appropriation out of county school funds to be paid as compensation for medical expenses to a pupil seriously injured in a physical education class.

Religious issues--Church-state issues in 1967 school cases centered on prayer practices, distribution in public-school classrooms of flyers opposing a change in the New York Constitution which would permit the use of public funds for nonpublic schools, the expenditure of federal tax funds for books and materials and instructional services for nonpublic-school pupils under the Elementary and Secondary Education Act, and the constitutionality of state statutes providing free textbooks and free bus transportation to parochial-school pupils.

The New Hampshire Supreme Court responded with an opinion on the constitutionality of proposed bills before the state legislature. It held that a form of morning exercise at the discretion of the classroom teacher including prayer recitation and reading of the Bible without comment would violate the Establishment Clause of the First Amendment, but a proposed law to require a period of silent meditation in the classroom at the start of the school day would be constitutionally permissible.

The Pennsylvania Supreme Court upheld the constitutionality of a 1965 statute providing for free transportation over established public-school bus routes to pupils in nonpublic elementary and secondary schools not operated for profit. The statute was deemed to be public welfare legislation, with the bus service of benefit to the children and not to the benefit of the church-related schools they attend. The Supreme Court of the United States dismissed an appeal from this decision for want of a substantial federal question. In the second case concerned with bus transportation to parochial-school pupils, a New Jersey court also sustained the constitutionality of the bussing statute involved; but this court ruled invalid contracts the school board awarded to provide service along specially designed routes for these children as violative of the statute providing that transportation, if supplied, be along established public-school bus routes.

Taxpayers in Ohio and New York brought actions in federal courts seeking to enjoin on First Amendment grounds the use of federal funds for the acquisition of school library resources, textbooks, and printed instructional materials for children in nonpublic schools under Title II of the federal Elementary and Secondary Education Act. The New York case, in addition, asked for an injunction against the use of Title I funds to finance instruction in reading, arithmetic, and other subjects in religious and sectarian schools. In both cases, the federal courts held, pursuant to existing judicial precedent, that the taxpayers had no standing to maintain the actions. The Supreme Court of the United States accepted an appeal in the New York case and with one dissent, held in a decision delivered on June 10, 1968, that a taxpayer had standing to attack the constitutionality of a federal statute on the grounds that it violates the Establishment and Free Exercise Clauses of the First Amendment. This marks the first time in 45 years that the doctrine in Frothingham v. Mellon was not a barrier to a taxpayer challenge of the expenditure of funds under a federal statute. The merits of the constitutional claims in this case are yet to be adjudicated. (Flast v. Cohen (36 U. S. Law Week 4540, June 10, 1968.))

The Supreme Court of the United States also affirmed the decision of the highest court in New York which upheld a statute requiring the loan of textbooks free of charge to pupils in parochial schools. The Supreme Court decided 6 to 3 that this statute did not violate the Establishment Clause of the First Amendment, concluding that the loan program was of financial benefit to the children and their parents and not to the sectarian schools. (36 U. S. Law Week 4540, June 10, 1968.)

Miscellaneous issues--In other 1967 cases of interest involving pupil rights, the Supreme Court of the United States accepted an appeal by Iowa pupils who were suspended from school temporarily for violating a school-board rule against wearing arm bands protesting the Viet Nam war.

TABLE 1.--MAJOR ISSUES INVOLVING PUPILS IN 1967

State	Admission and attendance	School desegregation	Pupil injury	Religion; sectarian education	Transportation	Miscellaneous	Total decisions
1	2	3	4	5	6	7	8
Alabama	...	2	...	...	...	...	2
Arkansas	...	7	...	...	...	...	7
California	...	...	3	...	...	1[a]	4
Colorado	...	...	...	...	...	1[b]	1
District	...	2	...	...	...	...	2
Florida	...	1	1	...	...	...	2
Georgia	1	2	1	...	...	...	4
Illinois	...	...	1	...	...	...	1
Indiana	...	1	...	...	...	...	1
Iowa	...	...	...	...	...	2[c]	2
Kentucky	...	...	1	...	...	...	1
Louisiana	1	3	1	...	...	...	5
Maryland	1	...	...	...	...	...	1
Massachusetts	...	1	...	...	...	...	1
Michigan	...	1	...	...	...	...	1
Minnesota	...	...	2	...	...	...	2
Mississippi	...	1	...	...	...	...	1
New Hampshire	...	...	...	1	...	...	1
New Jersey	1	1	2	...	1	...	5
New York	1	3	2	3	...	3[d]	12
North Carolina	...	2	...	...	...	...	2
Ohio	1	1	...	1	...	1[e]	4
Oklahoma	1	1	...	...	...	...	2
Pennsylvania	...	1	2	...	1	...	4
South Carolina	...	2	...	...	...	...	2
Tennessee	...	5	...	...	...	...	5
Texas	3	2	...	...	...	1[f]	6
Virginia	...	3	...	...	...	...	3
Washington	...	...	2	...	...	...	2
Wisconsin	...	...	2	...	...	...	2
Total number of decisions	10	42	20	5	2	9	88

a/ Constitutional challenge of suspension and dismissal of university students for violating university policy on student conduct and discipline arising out of impropriety during campus rally.

b/ Damage action for denying home tutoring to a physically handicapped child.

c/ One case sought to enjoin a school-board rule barring married students from participating in extracurricular activities. The other case questioned the constitutional validity of a school-board rule banning pupils from wearing arm bands connected with the Viet Nam war.

d/ Issues are (a) legality of school-board rule against leaving school grounds during noon recess on penalty of suspension; (b) violation of due process rights in suspending a pupil's State Board of Regents examination privileges for alleged copying during examination; and (c) right of a pupil to have attorney present during guidance conference following his suspension from school.

e/ Action to permit high-school pupils to participate in athletic competition.

f/ Suit seeking re-entry of student suspended for violating university rule on speeding on and off campus.

A federal appellate court ruled in a New York case that a school-board provision against the presence of an attorney to represent the pupil in a guidance conference following his suspension from school for disciplinary reasons did not deprive the pupil of due process under the Fourteenth Amendment. School-board regulations against extreme hair styles and suspension of pupils for noncompliance with the regulations were sustained by federal courts in cases arising in Texas and Louisiana. These regulations were held not to violate the constitutional rights of the pupils.

Texas courts in two instances ruled that school boards had no authority to cause pupils who marry to withdraw from school until the end of the school term. However, under Texas and Iowa decisions, married pupils could be excluded from participating in extracurricular activities.

ADMISSION AND ATTENDANCE

Georgia

Peagler v. Thigpen
157 S.E. (2d) 750
Supreme Court of Georgia, October 20, 1967.

Petitioners asked the court to prohibit the Ware County board of education from proceeding with the transfer and assignment of pupils from two county schools. They alleged that on May 22, 1967, the board had denied their application to continue the present assignment of children residing in the Millwood-Manor residential area to the Millwood Grammar School. After a petition of certiorari was filed in the County Court, the board on May 26, 1967, passed an order to abolish the Millwood Grammar School and grades 9-12 of the Manor school and to transfer the children to other county schools. Petitioners sought to prohibit the implementation of this last order.

The lower court sustained the school-board demurrer and dismissed the petition. On appeal, the judgment was affirmed.

The court held, as it did in Booth v. Ware County Board of Education, 154 S.E. (2d) 234 (1967), also involving the same parties and subject matter, that the action of the school board with respect to the transfer and assignment of the pupils was authorized by statute, and the lower court properly refused to enjoin the board from carrying out its plan.

Louisiana

Davis v. Firment
269 F. Supp. 524
United States District Court, Eastern District, Louisiana, New Orleans Division, June 13, 1967.

Suit was filed by a parent on behalf of his 15-year-old son against the New Orleans school board, the superintendent, and the principal of his high school.

The father sought an injunction against enforcement of a school regulation regarding hair style as to his son, and damages in the amount $12,000 each for himself and his son for the embarrassment resulting when the boy was suspended from school for 16 days because his hair was too long. It was argued that the action of the school authorities violates rights guaranteed to the student by the First, Eighth, Ninth, and Fourteenth Amendments of the Constitution of the United States, as buttressed by the Civil Rights Act.

Louisiana law requires school attendance for 15-year-olds. The law also provides for their suspension by the school principal for "good cause pending a hearing before the...city superintendent of schools" with a right of reversal reserved to the school board. Pupils guilty of willful disobedience may also be suspended.

A student handbook was distributed during the first three days of school regarding a demerit plan designed to promote discipline. The handbook referred to regulations on dress and grooming which were posted in each room and which included the statements that hair should be clean and neat and should be styled in accordance with styles acceptable for school wear; and that exceptionally long, shaggy hair and/or exaggerated sideburns should not be worn. On two successive days thereafter, the principal issued bulletins to the effect that fads and immodesty in dress and grooming would not be permitted and students ignoring that regulation would be subject to exclusion or suspension.

The student in this case was warned to get a haircut by at least two teachers before the principal suspended him for three days. Six days after the suspension, the student and his father sought readmission at a conference with the assistant principal, but readmission was refused. A conference was held later in the office of the school system with two assistant principals and the principal of the high school, and the student and his father accompanied by counsel. Again readmission was refused. The superintendent sustained the decision. After a hearing with the student present and his counsel, the school board upheld the principal and the superintendent, refusing readmission until the student obtained a haircut. Two days later the boy was readmitted when he reported with an acceptable haircut.

The question presented was whether or not the student has a constitutional right, buttressed by the Civil Rights Act, to keep his hair long in direct disobedience to rules and regulations of the school board, acting directly and through its superintendent and its principal.

The court denied the student's application for a preliminary injunction and granted summary judgment dismissing the action.

The student argued that the choice of a particular style of hair grooming constitutes symbolic expression or speech and, therefore, subject to the First Amendment protection. The court said that symbolic expression is entitled to First Amendment protection, adding, "But a symbol must symbolize a specific viewpoint or idea. A symbol is merely a vehicle by which a concept is transmitted from one person to another; unless it represents a particular idea, a 'symbol' becomes meaningless.... But just what does wearing long hair symbolize? What is student Davis trying to express? Nothing really."

In the opinion of the court, the wearing of long hair, even if assumed to fall within the type of expression which is manifested through conduct, is subject to reasonable regulation in furtherance of a legitimate state interest. Unusual hair grooming, the court said, could disrupt the learning atmosphere and was, therefore, an appropriate subject of regulation in furtherance of state interest.

Maryland

Bernstein v. Board of Education of
Prince George's County
226 A. (2d) 243
Court of Appeals of Maryland, February 13, 1967.

Parents of children who were being transferred in mid-term from one elementary school (Forestville) to another (Arrowhead), farther away from their homes, sought to restrain the transfer on several grounds, including: that the school board usurped the county superintendent's duties in ordering the transfer, that the board failed to give proper notice of the proposed hearing regarding the transfer, that the board did not provide a record of the hearing, that the hearing was contrary to the principles of due process of law, and that the transfer was motivated by racial considerations. The lower court dismissed the suit. The decree was affirmed on appeal.

The statutes provide that control and supervision of the local school system shall be exercised by the county board of education through its executive officers and the county superintendent and that the county superintendent shall decide all board of education and school system controversies and disputes involving school-board rules and regulations and the proper administration of the school system. The parents' contention that under these provisions, it was the duty of the superintendent rather than the board to decide student transfers from one school to another, was held to be without merit. The court found that the action of the board was in effect a redivision of the county into school districts. This redivision was not a controversy or dispute but an exercise of the board's legislative discretion. Moreover, the board action on the redivision was not a contested case within the Administrative Procedure Act or an adversary proceeding, but a legislative action for which a hearing was not a legal requisite, unless a statute or administrative rule so provides.

The long-standing board policy to hold open hearings at which parents of children affected by a proposed action could be heard, the court said, may be taken as a board rule that before redivision of school districts is determined, the board will have a public hearing open to persons affected. For such hearing to be a fair one, adequate notice and opportunity to be heard must be given.

As to the fairness of the notice of hearing in this case, the facts showed that the parents were apprised by letter on September 27, 1966, that the transfer proposal was set for presentation to the board on October 4, 1966, and that on September 29, 1966, staff representatives at the school would answer questions regarding the proposed change. The court held that the six days' notice of the hearing to be held on October 4, 1966, was adequate under the circumstances. The school term had just begun, and the constantly expanding population of the county confronted the board with an emergency resulting from unexpected overcrowding of the Forestville School. In view of this, the board may well have deemed it to be in the pupils' best interests to promptly consummate the proposed reassignment and permit transferred children to adjust to their new school as soon as possible after the beginning of the term.

Nor did the court find any abuse of discretion in the board's failure to grant a continuance as requested by the parents in order that they might employ legal counsel, because granting a continuance was within the sound discretion of the board, and there was enough time within the six days for the parents to employ an attorney to appear at the hearing.

The parents' contention that their rights were violated because their request for a transcript of the hearing was refused was deemed unmeritorious for the reason that no transcript of the meeting was taken and none was required by law.

The court found that the parents' contention that the transfer was to adjust the racial population in the Arrowhead School was unsupported by any probative testimony. If the action was taken to relieve overcrowding, it was immaterial that an incidental effect was adjustment of racial imbalance.

New Jersey

State v. Massa
231 A. (2d) 252
Morris County Court, Law Division, New Jersey,
June 1, 1967.

The parents of a 12-year-old child appealed their conviction on a charge of failing to cause their child regularly to attend the public schools and for failing to send her to a private school or to provide equivalent instruction elsewhere than at school.

The parents had been teaching the child at home from texts compiled by the mother and from regular texbooks used as a supplement as a source for test material and written problems. Admitted into evidence were test scores, all B or above, on examinations taken in the public schools after the child had been taught at home for two years. A report by an independent testing service revealed that the child's scores on standard achievement tests were considerably higher than the national median, except in arithmetic.

While both parties stipulated that the lack of teacher certification was not an issue, since New Jersey schools employ noncertificated teachers, the school board stressed the lack of social development because of the home teaching.

The court held that not only had the school board failed to prove beyond a reasonable doubt that the parents had not provided an "equivalent" education for their daughter, but that under the New Jersey statute "equivalent instruction elsewhere than at school" requires only a showing of academic equivalence. The court said that "to hold that the statute requires equivalent social contact and development as well would emasculate this alternative and allow only group education, thereby eliminating private tutoring or home education."

The board's charge that, based upon limited education experience, the parents lack teaching ability and proper techniques, was held to be not pertinent to the issue of equivalency. In any event, the mother was, in the opinion of the court, "self-educated and well qualified to teach her daughter the basic subjects from grades one through eight."

New York

Drayton v. Baron
276 N.Y.S. (2d) 924
Supreme Court of New York, Special Term,
Nassau County, Part I,
January 23, 1967.

An aunt sought a judgment requiring admission of her seven-year-old niece to a public school. The mother of the child lived in South Carolina, but since October of the school year, the child lived with the aunt who had sole custody, control, and care of her. The defense was that the aunt failed to offer competent proof of the parents' residence or of the parents' surrender of control over the child. When seeking to register the child, the aunt produced the child's birth certificate and her own affidavit accepting full care, custody, and responsibility for support and maintenance. But the aunt failed to provide certification by the child's parents that they relinquished care and control.

The issue before the court was whether a school board, as a condition of admittance of a child whose parents did not reside in the school district but who lived in the district with a collateral relative, may require certified proof that the parents have unequivocably relinquished care and custody of the child. The court held that a school district could make such demand.

The court stated that the general rule for purposes of school attendance is that a child's residence is presumed to be in the district where the child's parents reside. But this does not mean that a child cannot reside in a particular district for school attendance purposes, although the child and his parents do not themselves reside in that district. On the other hand, a putative residence of a child in a district established for the purpose of taking advantage of its school facilities does not require that the child receive an education therein at the expense of resident taxpayers. In each case, a factual determination must be made as to the child's care and custody as well as bona fide relinquishment of control by the parents. Unless this is done, no clear, legal right to the child's admittance is shown.

Since in this case there was no evidence of parental relinquishment or transfer of the child's care and custody or of the aunt's efforts to obtain such relinquishment or transfer, or who was financially supporting the child, the aunt was held not to have established the child's legal right to attend school in the aunt's district. The petition was dismissed without prejudice to further proceedings after a new application with proper evidence is presented.

Ohio

In re DiSalvo
227 N.E. (2d) 441
Probate Court of Cuyahoga County, Ohio,
June 27, 1967.

These proceedings involved an application for appointment of an elder sister as guardian for a 14-year-old girl.

For several years the girl had been living with her adult sister in the City of Fairview and attending a parochial school there. Her parents were residents of Cleveland. When the older sister attempted to enroll the girl in the public high school, admission was denied on the assertion that the girl was not a child or ward of a resident of the school district. The adult sister then sought to be appointed guardian to bring the girl within the purview of the controlling statute.

The court denied the application for guardianship and declared that such an appointment could be made only where there is "a showing that the parent is not a fit person, or has, by abandonment, forfeited his right to the care, custody, and control of the child." Such a showing was not made. In the present case, the court found the parents to be of excellent character and reputation, and that they were "probably inspiring this proceeding...to attempt to effect what they deem to be a better education for their minor daughter."

Oklahoma

Board of Education of Independent School District No. 1 of Tulsa County v. Clendenning
431 P. (2d) 382
Supreme Court of Oklahoma, April 18, 1967.

The Tulsa county superintendent of schools authorized the transfer of 28 grade- and high-school pupils to nearby school districts. Requests for transfer were handled informally by use of the telephone to obtain information from the parents. The resident school district authorized transfers for any one of three reasons: the school district did not offer the vocational subjects desired; the best interests of the child would be served by a transfer, in the opinion of the board of education; or transfer would be more convenient for the parent or child and in the best interests of the child. The applicable state statute authorizes superintendents to grant transfers for several reasons, including a transfer when the vocational subject sought is not offered in the home district, providing the receiving board agrees to the transfer; or if the topography of the district or the health of the child is such that his best interests cannot be served by attendance in the district where he resides. The statute also gives the board of education the power to grant a transfer when it is in the best interests of the child.

The board of education of the school district in which the pupils lived requested the trial court to assume original jurisdiction and sought an injunction against the transfer of the pupils. The trial judge treated the hearing as an appeal rather than a trial de novo, and held that the board had a duty to demonstrate by competent evidence that the superintendent had erred in making the transfers; and since the board failed to make a timely protest against the transfers, it could not now contest the superintendent's orders. Although the testimony of parents was not allowed, the board and the superintendent were allowed to testify and present evidence.

The statute upon which the trial judge relied in treating the proceeding before him as an appeal states: "...the board of education of either district or the parent or guardian of the child may appeal, in writing, from the action of the County Superintendent of schools to the district court of the county in which the child resides, and such appeal shall be heard, and a decision rendered thereon, not later than June 30th and such decision shall be final."

The questions for decision were whether the trial court should have treated the "appeal" as a trial de novo or as an appellate proceeding, and whether the facts available sustained its decision affirming the superintendent's transfer action.

The Supreme Court of Oklahoma reversed the trial court and enjoined the transfer of the pupils. Since the statute which the trial court relied upon does not require the filing of a transcript of the superintendent's conferences with the parents, the court concluded that "appeal," as used in the statute, should be interpreted to mean a trial de novo. Certainly, the "proceedings before the county superintendent are informal in nature and are not conducive to the making of a formal record."

Having decided that a trial de novo should have been held, the court then determined that on the face of the record, the superintendent lacked authorization to grant the transfers involved, for these reasons: As to transfers for vocational studies, there was no showing that the subjects sought were in fact vocational subjects nor did the superintendent attempt to determine whether the outside schools offered the vocational subjects requested. As to the second classification of transfers, the record showed no evidence that the home school district had made a determination that the transfers were in the best interests of the child. And the third classification of transfers by the home district, which involved "the convenience of the parent or child and the best interest of the child," does not come within one of the reasons for transfer set forth in the statute.

Texas

Anderson v. Canyon Independent School District
412 S.W. (2d) 387
Court of Civil Appeals of Texas, Amarillo, February 28, 1967.

A 16-year-old pupil withdrew from the ninth grade of an Amarillo school to marry and reside in Canyon, Texas, where she applied for admission to the local junior high school. The admission was denied because of a rule that "students who marry during the school term must withdraw from school for the remainder of the school year." The pupil was qualified for admission in all other respects.

In view of the statutory provisions requiring a school board to admit persons between 6 and 21 years of age to school if they or their parents reside in the district, the court concluded that the school board was without legal authority to adopt and enforce the rule in question. The board was ordered to admit the pupil to its junior high school, notwithstanding her marriage.

Carrollton-Farmers Branch Independent School District v. Knight
418 S.W. (2d) 535
Court of Civil Appeal of Texas, Texarkana, August 1, 1967; rehearing denied, August 29, 1967.

Two high-school students, an 18-year-old girl and a 17-year-old boy, married with parental consent during the school term. As a result they were suspended from school under a school-board rule that married students shall immediately terminate their enrollment. Readmission could be requested after an interval of time, but married students could not participate in extracurricular activities. After the suspension in this case, the board changed its rule to provide that married students would be suspended for three weeks.

The trial court issued a temporary restraining order directing the school board to permit the married students to attend school for scholastic purposes only. At a trial that followed, it was shown that the presence of this married couple at school did not cause turmoil, unrest, and upheaval against education by fellow students, that the scholastic ability of these two students was not affected by their marriage, and that the board rule suspending students from school for marriage had not been uniformly applied. The students were suspended merely because they had married.

The issue on appeal was whether the trial court abused its discretion in granting a temporary injunction restraining the board from enforcing the suspension.

In accord with the weight of judicial authority in Texas and in the United States, the court ruled that marriage alone was not a proper ground for a school district to suspend a student from attending school for scholastic purposes only. The court held that on the record in this case, the trial court did not abuse its discretion in granting the temporary injunction against the school board.

Ferrell v. Dallas Independent School District
261 F. Supp. 545
United States District Court, N. D. Texas, Dallas Division, December 9, 1966.

Three high-school students were denied admission to school because they wore their hair "Beatle" style. These students were members of a professional musical group whose performance contract required them to have this hair style. Instead of following normal registration procedures, the students went to the office of the principal to confer with him on their admission with the understanding that entrance would be denied them because of the way they wore their hair. There was fairly reasonable indication that the attendant publicity which followed the principal's refusal to admit them could have been deliberately planned by their agent.

The students brought an action seeking to restrain the school authorities, claiming that the action of the school principal, supported by his administrative superiors, denying them admission into school until they cut their hair was arbitrary and discriminatory and violated their constitutional rights to equal opportunity for a public education.

The court approached the question before it in terms of whether the school authorities were legally authorized to formulate the regulation that students' hair style shall not be "Beatle-length." In this connection, the court said it could focus on the school administration and attempt to justify the regulation by emphasizing educational need for an academic atmosphere and the resulting demand that disturbances be kept at a minimum. Or it could focus on the individual student and evaluate the need for regulation by examining the purposes of a public-school education in terms of the individual. The regulation, the court said, must serve both purposes. But the court felt that where the effects of the regulation extend beyond the classroom and bear directly on the students' person and his freedom of expression, the latter approach provides a more reasonable basis for school concern, and it is on this basis that the court should look for justification of the regulation.

The regulation in question, the court stated, arises from the generally accepted proposition that the superintendent, principal, and school board may officially exercise whatever powers of control, restraint, and correction over pupils as may be reasonably necessary to "enable teachers to perform their duties and to effect the general purposes of the educational system."

The court held, under the facts of this case, that there was no abuse of discretion on the part of the school authorities. On the contrary, they acted reasonably in the circumstances, taking into consideration these individual students and the need for an academic atmosphere. The court was of the opinion that there was no violation of the students' state or federal rights. Further, the terms on which a public free education is granted in the high schools of Texas cannot be fixed or determined by the students themselves.

Therefore, the court dissolved the temporary order requiring admission of the students without compliance with the haircut rule, and denied the students' motion for a temporary injunction.

SCHOOL DESEGREGATION

Alabama

Lee v. Macon County Board of Education
270 F. Supp. 859
United States District Court, Middle District of Alabama, Eastern Division, July 28, 1967.

(See Pupil's Day in Court: Review of 1966, p. 16; Review of 1964, p. 20; Review of 1963, p. 14.)

In March 1967, a three-judge federal district court issued a decree ordering the Alabama State Board of Education, its members, and the superintendent of education to implement by the 1967-68 school term a desegreation plan meeting court-prescribed standards in all state public school systems not already under court order to desegregate.

Subsequently, the state superintendent submitted to the court, as ordered, a compliance report including the desegregation plans adopted by the several school systems. The Department of Health, Education, and Welfare then found that the Lanett school system, one of the systems included in the superintendent's report, was not complying with Title VI of the 1964 Civil Rights Act and, therefore, halted all federal assistance to the school system. On motion of the Lanett school board, the court issued a temporary restraining order enjoining HEW officials from terminating federal assistance to the school board.

In the hearing to determine if a permanent injunction should issue, the court stated the issue to be "whether the Department of Health, Education, and Welfare, acting independently and without court approval, has the authority to terminate federal financial assistance to a school system when such school system is under a final court order, is in compliance with that order, and gives assurance to the Department of Health, Education, and Welfare of compliance."

The hearing revealed that the Lanett school board had adopted the court-prescribed desegregation plan, had begun to implement it, and had filed with HEW assurance that it would comply with the plan. While recognizing that HEW was obliged by the Congress to see that no federal money goes to any program in which there is racial discrimination, the court also noted that a departmental regulation deemed the required assurance of compliance as a requisite to obtaining federal financial assistance satisfied if the school board were subject to a final order of a federal court for desegregation of its schools and if the board gave assurance that it would comply with the order.

The court rejected the determination of HEW officials that the Lanett school board was not complying with the court decree and also their argument that, in any event, the board was not under court order since the desegregation decree was entered against state officials.

The court found and concluded that not only were the school systems in Alabama under the direct control of state officials, but that when the court order of May 22, 1967, was issued and served, the Lanett school system and the other school systems became subject to a final order of the court. By becoming subject to a final order and agreeing to comply with it by filing their desegregation plans subsequent to the decree of March 22, 1967, the school systems automatically were brought back "into compliance" with the HEW regulation insofar as being eligible to receive federal financial assistance. The court held that the action taken by HEW terminating federal assistance based upon a determination of noncompliance made prior to the court's order was invalid and in violation of the department's own regulation, and moreover, served to "thwart the implementation" of the order of the court.

The court held also that there can be no termination of federal assistance by HEW as to any school systems under the court's order where the systems have given assurance of compliance to HEW and are in full compliance with the requirements of the court order without prior approval of the court. However, the court recognized that HEW was under a duty to investigate school-board compliance with desegregation decrees and to bring evidence of noncompliance to the attention of the court for possible action.

United States v. Jefferson County Board of Education (Alabama)
United States v. Board of Education of the City of Fairfield (Alabama)
United States v. Board of Education of the City of Bessemer (Alabama)
United States v. Caddo Parish School Board (Louisiana)
United States v. Bossier Parish School Board (Louisiana)
Johnson v. Jackson Parish School Board (Louisiana)
Banks v. Claiborne Parish School Board (Louisiana)
Andrews v. City of Monroe (Louisiana)
Davis v. East Baton Rouge Parish School Board (Louisiana)
United States Court of Appeals, Fifth Circuit, December 29, 1966, 372 F. (2d) 836; rehearing, En Banc, March 29, 1967, 380 F. (2d) 385. Certiorari denied, 88 S. Ct. 72, October 9, 1967.

Decision of December 29, 1966 (three-judge court), 372 F. (2d) 836.

Three Alabama and four Louisiana school cases were consolidated on this appeal brought to review whether the desegregation plans in these school systems met constitutional standards. (Two other Louisiana cases were added on the rehearing of the appeal.)

The appeal required the court to re-examine school desegregation standards in the light of the 1964 Civil Rights Act and the existing guidelines of the U. S. Office of Education, Department of Health, Education, and Welfare, issued under Title VI of the Act. Title VI requires all federal agencies administering any federal grant-in-aid program to see to it that there is no racial discrimination by any school or other recipient of federal financial aid against the beneficiaries of the federal assistance programs. Defendants, the school boards, attacked the HEW guidelines on numerous grounds.

The Court of Appeals of the Fifth Circuit held that the HEW guidelines are constitutional and are within the statutory authority created by the 1964 Civil Rights Act. In accord with its prior decisions, the court held also that in determining whether school desegregation plans meet constitutional standards in the Brown and other Supreme Court decisions, the federal district courts in the Fifth Circuit should give great weight to the HEW guidelines because they are based on decisions of this and other courts, are formulated to stay within the scope of the 1964 Civil Rights Act, are prepared in detail by experts in education and school administration, and are intended by the Congress and the Executive to be part of a coordinated national program. The court said that the guidelines present the best system available for uniform application, and the best aid to the courts in evaluating the validity of a school desegregation plan and its progress.

Further, since under the HEW guidelines, schools automatically qualify for federal assistance whenever a final court order desegregating the schools has been entered, and because of the court's duty to cooperate with the Congress and the Executive in enforcing Congressional objectives, the court found strong policy considerations to support its holding that the standards of court-supervised desegregation should not be lower than the HEW-supervised desegregation standards. Unless judicial standards are substantially in accord with the HEW guidelines, the court said, school boards previously resistant to desegregation will resort to the courts to avoid complying with the minimum standards HEW promulgated for schools that desegregate voluntarily.

While stating that the HEW guidelines cannot bind the courts, the court held that its desegregation standards are substantially the same as the court's standards, and that in evaluating desegregation plans, the district courts should make few exceptions to the HEW guidelines. It should be noted, the court said, that school boards cannot, by giving up federal aid, avoid the national policy in the Civil Rights Act of desegregating the public schools that produced this limitation on federal aid to schools. The opinion stated: "The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary, nonracial systems--with or without federal funds."

The court rejected arguments of the defendants that the guidelines are contrary to the provisions of the Civil Rights Act and the constitutional intent there expressed, because they require integration, not mere desegregation, and school boards have no affirmative duty to integrate. Using the terms integration and desegregation to mean conversion of a de jure segregated school system into a unitary nonracial system, the court held that the law, as stated in numerous federal court decisions, compels states in the Fifth Circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities. Relief to Negroes as a class requires conversion of dual zones, the central vice of a formerly de jure segregated public school system, into a single system.

Moreover, the court found that defendants erred in their contentions that the courts could not take race into consideration in establishing standards for desegregation. Race is relevant in these cases, the court said, because the governmental purpose is to offer Negroes equal educational opportunities, and the means to this end, such as disestablishing segregation of pupils, distributing the better teachers equitably, equalizing facilities, selecting appropriate school sites, and avoiding resegregation, must be based on race.

Also considered but rejected by the court were defendants' contention that the HEW guidelines violated Congressional intent, as defined in amendments to Titles IV and VI of the Civil Rights Act. As to this contention, defendants relied on a provision in Section 401 which defined desegregation but excluded from the definition assignment of pupils to "overcome racial imbalance" and on an anti-bussing provision in Section 407. The court construed these provisions in the light of their legislative history as relating to bona fide neighborhood school systems and precluding HEW from requiring bussing of children across district lines or requiring compulsory placement of children to strike a racial balance where imbalance resulted from de facto segregation. But these provisions were not intended to apply to corrective acts to desegregate a dual school system initially based on de jure segregation.

In contending that the HEW guidelines violated Congressional intent, defendants relied principally on Section 604 which reads that nothing in Title VI shall be construed to authorize action by any department or agency with respect to any employment practices, except where the primary objective of the federal assistance is to provide employment. The school boards argued that this section bars any action requiring desegregation of faculties and school personnel. The court said this contention was without merit and found that Section 604 was never intended as a limitation on desegregation of the schools. Faculty integration is essential and indispensable to the desegregation of school children, the primary beneficiaries of the federal assistance programs. If defendants' view of Section 604 were correct, the court continued, the purpose of Title VI would be frustrated, for one of the keys to desegregation of the schools is the integration of faculty.

The court then considered "freedom of choice" plans which the guidelines and judicial decisions recognize as permissible means of desegregation. The court found that as presently administered, the freedom-of-choice methods of desegregating the schools have serious shortcomings. The inadequacy of the freedom-of-choice plans, the court stated, is that the schools tend to retain their racial identification, and require affirmative action by parents and pupils to disestablish the existing system. The court noted that white students rarely choose to attend schools identified as Negro schools, and only Negro students of exceptional initiative and fortitude choose white schools, and that new construction and improvement to the Negro school plant attract no white students and diminish Negro motivation to request transfers.

The court set out these specific elements to make a freedom-of-choice plan effective: All grades should be desegregated by the 1967-68 school year; a freedom-of-choice plan is inadequate if based upon a preliminary system of assignment by race or dual geographic zones; in place of a permissive freedom of choice, there must be a mandatory annual free choice of schools by all students, Negro and white; initial choice of assignment within space limitations should be made without regard to race; uniform nonracial standards should be used to determine preferences when the number of applicants exceeds the available space in a school; assignments should be based on a uniform nonracial basis when any student fails to exercise his choice; notice provisions in the HEW guidelines should be followed; a transfer provision should be included in the plan and the right of transfer in the Pupil Placement Law should be regarded as an additional right; the plan should contain a statement that there will be no segregation or discrimination in services, facilities, activities, and programs sponsored by or affiliated with the schools; the plan should provide for the closing of inferior schools, and include provisions for remedial programs to overcome past inadequacies of all-Negro schools; and lastly, the elimination of racial discrimination in the hiring and assignment of new faculty members, and the taking of affirmative programmatic steps to correct existing effects of past racial assignment, with the goal being an equitable distribution of the better teachers.

Attached to the opinion was a proposed decree to be entered in the district courts in the instant cases. The provisions of the proposed decree were intended also, as far as possible, to apply uniformly throughout the Fifth Circuit in other cases involving plans based on freedom of choice of schools.

In conclusion, the court said: "Now after twelve years of snail's pace progress toward school desegregation, courts are entering a new era. The question to be resolved in each case is: How far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children? The clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed.'"

The judgments below were reversed and each case was remanded to the district court for further proceedings in accord with this opinion.

Decision on rehearing En Banc (12-judge court), (March 29, 1967,) 380 F. (2d) 385.

On rehearing of the case En Banc, the court 9 to 3, adopted the opinion and decree of December 29, 1966, with a clarifying statement and changes in the decree.

The court held that the school boards and public-school officials in the Fifth Circuit "have an affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and white schools--just schools." Expressions in its earlier opinions distinguishing between integration and desegregation, the court stated, must yield to this affirmative duty, which goes beyond offering Negro children an opportunity to attend formerly all-white schools, and requires integration of faculties, facilities, and activities, as well as students. To the extent that any earlier decisions of this court are in conflict with this view, they are overruled.

The opinion stated further that freedom of choice is not a goal in itself, but is one of the means available at this stage of the process of converting the dual system of segregated schools into a unitary system. The governmental objective of this conversion is educational opportunities on equal terms to all, and the criterion to determine the validity of a provision in a desegregation plan is whether the provision is reasonably related to this objective.

As to the percentages referred to in the HEW guidelines and in the decree, the court said, these are a rough rule of thumb for measuring the effectiveness of the freedom-of-choice plan as a useful tool, not a method of setting quotas or striking a balance. If the plan is ineffective, school officials should try other tools.

The opinion also stated that the HEW guidelines of 1965 and 1966, which established minimum standards for school desegregation, and the decree in this case are within the decisions of this court, comply with the letter and spirit of the 1964 Civil Rights Act, and meet constitutional requirements. Further, the courts of the Fifth Circuit should give great weight to future HEW guidelines when they are applicable to this circuit and are within lawful limits.

The corrected decree enjoined the defendants from racial discrimination in the operation of their school systems, and directed them to disestablish all school segregation and to eliminate the effects of the dual school system. To accomplish this, the decree provided that commencing with the 1967-68 school year, all grades, including kindergarten, shall be desegregated and all pupils assigned to schools without regard to race through a mandatory annual exercise of choice of school by all students or their parents. Where the choice is not so exercised, the student is to be assigned to the school nearest his home where space is available. In assigning students, no preference is to be given for prior attendance at a school, and except with the approval of the court in exceptional circumstances, no choice shall be denied for any reason other than overcrowding at a school; in that event, preference shall be on the basis of the proximity of the student's home to the school chosen under uniformly applied nonracial standards. Transportation, where provided, must be routed to the maximum extent feasible so as to serve each student choosing any school in the system. No school official, teacher, or employee shall attempt to influence any parent or student choice of school, or favor or penalize the person for his choice; and within their authority, school officials are responsible for and should take appropriate action to protect persons exercising their rights under the decree.

In addition to provisions for right of transfer to students whose assigned schools do not offer courses to meet their special needs, the decree provided that all services, facilities, activities, and programs, including transportation, athletics or other extracurricular activities, and special education activities shall be conducted without regard to race. Prompt steps are to be taken to make formerly all-Negro schools equal in all respects to the quality provided in the all-white schools, and if it is not feasible to improve a formerly all-Negro school, it is to be closed. Remedial programs are to be provided to students who attended segregated schools to overcome past inadequacies in their education. And new construction and expansion of any existing school shall be made with the objective of eradicating the vestiges of the dual school.

The decree also contained provisions with respect to notice, time schedule, and forms to be used by parents and students in making their choice of school, and for annual reports to the court on pupil assignment, including tabulations by race of the number of freedom-of-choice applications and transfer applications and their disposition, and the number of students by race enrolled in each grade in each school.

As to faculty and staff, the decree provided that race shall not be a factor in hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers. But race may be taken into account in order to counteract or correct the effect of segregated assignment of faculty and staff in the dual school system. Assignments shall be made so that the faculty and staff in a school are not members of one race exclusively, and the school authorities shall take positive and affirmative steps to accomplish desegregation in as many schools as possible for the school years 1967-68 and 1968-69, notwithstanding that teacher contracts have already been signed and approved. Further, teacher tenure shall not be used as an excuse not to comply with these provisions. Where, as a result of school desegregation, teachers or other professional staff are to be displaced, no vacancy shall be filled through outside recruitment unless there is no displaced staff member qualified to fill the vacancy. And if desegregation results in a reduction in the total professional staff, the qualifications of all staff members shall be evaluated in selecting the member to be released without consideration of race. A report of any proposed dismissals with reasons shall be filed with the clerk of the court and copies filed with opposing counsel within five days of the proposed dismissal or demotions. In addition, the school authorities are to report to the court periodically on the number of faculty vacancies, and how they were filled.

The Supreme Court of the United States refused to grant petitions for a writ of certiorari for a review of this decision to the school boards of Caddo and East Baton Rouge, Louisiana, and to the Bessemer, Alabama, school board.

Arkansas

Brown v. Board of Education of DeWitt School District No. 1
263 F. Supp. 734
United States District Court, Eastern District, Arkansas, Pine Bluff Division, January 19, 1966.

Negro high-school pupils in grades 10-12 brought a class action seeking to end alleged unconstitutional racial segregation in the DeWitt school district. It was alleged that white pupils in these grades were educated in the school district, while resident Negro pupils were required to attend a Negro school in another district which, apart from this segregation, had a curriculum inferior to that of the DeWitt white high school.

In their answer denying that the Negro pupils were entitled to the relief sought, the DeWitt school district attached a copy of its transitional desegregation plan approved by the U. S. Office of Education. Under this plan, the DeWitt high school was to be desegregated, starting with grade 10 in 1966-67 and grades 11 and 12 in 1967-68.

After a hearing held in September 1965, the court found that the curriculum in the high school outside the district attended by the Negro pupils was inferior and that the pupils then enrolled in grades 11 and 12 would be required to complete their education without an opportunity to attend a desegregated public school. In view of these facts, the court held that the board's desegregation plan was not sufficient to meet the requirements of the recent decisions of the Supreme Court of the United States and the Court of Appeals for the Fifth Circuit. Therefore, the court directed the school board to admit on request any Negro high-school pupil in grades 10-12 who wished to attend the DeWitt high school at the mid-term of the 1965-66 school year, if the request was made within a reasonable time after the start of the semester. As to the 1966-67 school year, all Negro pupils in grades 11 and 12 who wished to attend the desegregated DeWitt high school were to be admitted.

On the matter of school staff and faculty, the court said there was no evidence that the board ever practiced unconstitutional racial discrimination. The court pointed out that the board had never operated an all-Negro high school and had never hired Negro high-school teachers, but if desegregation of the high-school student body requires the board to hire additional personnel, or if vacancies occur at the high-school level, the board must not discriminate unconstitutionally against Negroes who may apply for teaching or administrative positions.

Clark v. Board of Education of Little Rock School District
369 F. (2d) 661
United States Court of Appeals, Eighth Circuit, December 15, 1966.

In 1965, the Little Rock school board abandoned the use of its pupil assignment law and adopted a freedom-of-choice plan of school desegregation which was approved by the district court.

Negro plaintiffs appealed this decision, challenging the constitutionality of the court-approved freedom-of-choice plan. Because of the school board's prior commitment to a geographical boundary plan and its failure to use deliberate speed in implementation of the Brown decision, plaintiffs contended that the plan should not be approved. They argued that such a plan in fact was not achieving an integrated school system, and cited statistics that as of 1965 only 621 of 7,341 Negro children in the school system of 23,000 children were actually attending formerly all-white schools. Plaintiffs also attacked the particulars of the plan, objecting to the lack of provisions for notice, to the "lateral transfer" provision because it failed to require the student to make an annual choice of school, and to the lack of positive guidelines to implement staff desegregation.

The court expressed the opinion that a general attack on the constitutionality of a freedom-of-choice method of school desegregation is not well taken at this time, noting that the method has tentatively been accepted in the HEW guidelines and by this and other courts as a way of achieving a nonracially operated school system. But the school board must actually in good faith adhere to the letter and spirit of this type of plan and affirmatively take all steps to afford the constitutional guarantee of equal protection to all pupils under the court's sanction by setting up single geographic school zones on a completely nonracial basis.

In the court's view, the plan adopted by the Little Rock school board, with the exceptions noted below, if properly administered, would establish a constitutional nonsegregated system of education, and there was no legal or equitable reason why the plan should not be initiated. The court noted that under the amended plan adopted in 1966, over 1,360 Negro children were attending formerly all-white schools in 1966, double the number in the previous year. This indicated to the court that the children were making effective choices that were being honored by the school board, and that actual integration was in fact taking place at an accelerated pace.

In objecting to the plan's administration, plaintiffs argued that the free choice supposedly given students was being interfered with by the school board in the operation of an orientation program which, it was claimed, effectively channels Negro students into Negro schools and white students into white schools. Since the court record lacked findings on this matter, the district court was directed to determine if the school board was honoring its pledge not to interfere with or influence the students' choice of school, and if the board was not doing so through the operation of the orientation program, the district court had authority to end the abuse.

Plaintiffs also argued that all students should be required to make a choice of school annually and that the plan was unconstitutional in this respect. Under the plan, only students entering grades 1, 7, and 10 were required to make a choice of school. Those in the other grades had the right each year to request a lateral transfer to another school which was honored if the school was not overcrowded. Students who did not ask to be transferred were assigned to the school they attended the previous year. The court held that the plan with its lateral transfer provision was constitutional, for a freedom-of-choice plan need not require the student to make an annual choice, but must only afford the student this right, which the contested plan did.

However, the court held that the plan approved by the district was deficient in two respects. The first was the lack of an adequate notice requirement to students for the annual freedom of choice. To correct this, the court said the school board should adopt the notice requirements in the HEW guidelines or submit an equally adequate notice plan to the district court for approval.

The second deficiency in the plan was the absence of specific provisions for desegregation of faculty. To overcome this, more than a general statement of good intention by the school board is necessary, the court said. The school board must take accelerated and positive action to end discriminatory practices in teacher assignment and recruitment. The court set forth these specific requirements: Future employment, assignment, transfer, and discharge of teachers must be free from racial consideration; teachers displaced when schools are closed in the desegregation process should, at the minimum, be absorbed into vacancies in the system; whenever possible, the board should honor requests of individual teachers to transfer into minority situations; and the board should make all additional positive commitments necessary to bring about some measure of racial balance in the individual schools in the future.

In view of the progress made by the school board in staff desegregation for the school year 1966-67, the court did not believe it necessary at this time to impose a set timetable with fixed mathematical requirements. But neither should there be a complete absence of any positive program for future action. A positive commitment to a reasonable program aimed at ending segregation of the teaching staff was deemed by the court to be necessary to the final approval of a constitutionally adequate school desegregation plan. Therefore, in addition to the specific requirements set forth, the district court on remand was directed to require the school board to include a positive program for faculty desegregation in its freedom-of-choice plan.

The district court was directed to retain jurisdiction to insure that a constitutionally acceptable plan is adopted and that it is operated in a constitutional permissible manner so that the goal of a desegregated nonracially operated school system is rapidly and finally achieved.

Clark v. Board of Education of Little Rock School District
374 F. (2d) 569
United States Court of Appeals, Eighth Circuit, March 31, 1967.

(See case digest above)

Following the December 15, 1966, decision of the appellate court, Negro plaintiffs petitioned for a rehearing with respect to its approval of the lateral transfer provision which is exercisable at the discretion of the individual student. Plaintiffs renewed their argument that the annual choice of school should be made mandatory each year for all students and asked for a rehearing for two reasons: (a) The recent decision of the Fifth Circuit Court of Appeals in United States v. Jefferson County Board of Education (see page 16 of this review) which adopted the HEW guidelines and in doing so, required that freedom-of-choice plans included a mandatory annual choice. (b) The allegedly erroneous conclusion of the appellate court in the instant case in assessing the non-mandatory annual choice of lateral transfer.

On consideration of the arguments presented, the court was of the opinion that a rehearing would serve no significant purpose and therefore denied the request therefor.

The court regarded plaintiffs' petition as urging it to adopt the guidelines of the Department of Health, Education, and Welfare, as an "absolute pole star for determining constitutional rights and duties in the area of school desegregation." The court decided that it could not do this because it is the function of the courts alone to determine when state action deprives individual citizens of their rights to equal protection and due process. The establishment or reduction of these constitutional rights cannot be accomplished by Congressional action or legislative fiat. Thus, while the court expressed great respect for the expertise of HEW and the usefulness of its guidelines to the courts and school districts in framing acceptable plans, this respect did not demand abdicating to HEW the responsibility of the courts for determining proper standards of constitutional protection. "A step in that direction would be to breach the carefully guarded wall that separates the three fundamental powers of government action."

After careful examination of the Little Rock freedom of choice plan, the court held that the plan, as approved by the court, was constitutional on its face, and that plaintiffs have made no showing that its non-mandatory provision for lateral transfers to schools has infringed their constitutional rights.

The court took no issue with but did not adopt a holding like that of the Fifth Circuit Court of Appeals, saying that the factual situation in Arkansas differs and that it has achieved a much greater degree of integration than have the states directly concerned with the Jefferson County decision. The court did not believe that it should flatly condemn a free choice plan that gave an annual freedom of choice to each student to laterally transfer to another school, subject only to conditions of overcrowding; instead such a plan should be given the opportunity to work, and if it does not, the court will then have to discard the plan as not according constitutional rights to all students.

Plaintiffs also argued that should a given school be filled to capacity, Negro children who might wish to transfer to the filled school would be "locked" to their choice of the previous year. This argument was premised on the assumption that white children who lived farther away than the Negro children would be permitted to attend the school. Plaintiffs claimed this would be unconstitutional discrimination and this defect should invalidate the non-mandatory choice provision in the plan. The court rejected the argument on the ground that it was being asked to rule on a hypothetical situation that might arise under the future operation of the plan, and that there has been no indication whatever on the record that students who wish to transfer laterally cannot and will not be fully accommodated.

The court recognized that the Little Rock plan, as any other plan, is subject to abuse and its future operation might give rise to undecided questions of constitutional law. It is for this reason, the court said, that the district court has been directed to retain jurisdiction of the case so that if and when a student is denied a transfer under the facts hypothesized by plaintiffs, the district court can decide whether the denial has resulted in a violation of the student's constitutional rights.

In conclusion, the court declared that if the present plan is not administered and operated so as to bring about a racially nondiscriminatory school system, the court could take steps to apply more rigid and stronger sanctions against the school board.

Kelley v. Altheimer, Arkansas, Public School District, No. 22
378 F. (2d) 483
United States Court of Appeals, Eighth Circuit, April 12, 1967; rehearing En Banc denied, May 9, 1967.

In this class suit a group of Negroes sought to enjoin the Altheimer school district from continuing plans to construct and from constructing separate schools for white and Negro pupils, from continuing to assign pupils, faculty, and administrative staff on a racially discriminatory basis, and from continuing any policy and practice of racial discrimination in the operation of the school district. The federal district court dismissed the complaint, and this appeal followed.

Prior to 1965-66, the school district maintained a totally segregated school system. In April 1965, in response to the enactment of the 1964 Civil Rights Act and the implementing guidelines of the U. S. Department of Health, Education, and Welfare, the School district submitted a voluntary desegregation plan of the freedom-of-choice type; after amendment, the plan was approved by the U. S. Commissioner of Education and put into operation in September 1965. In 1966-67, a total of 47 Negro pupils asked to be assigned to white schools. All the requests were granted. No white pupils asked to be reassigned to the all-Negro school complex. Apart from a few white teachers in the Negro school, the faculty of the school district remained segregated.

On appeal, the Negro plaintiffs did not challenge the constitutionality of the freedom-of-choice plan per se. Instead, they contended that the plan was inadequate to accomplish desegregation in the school district, and therefore, the district court erred in dimissing the complaint.

At the outset, the appellate court made it clear that a board of education does not satisfy its constitutional obligation to desegregate the schools by simply opening the doors of a formerly all-white school to Negroes. The court pointed out that in the cases where it had approved freedom-of-choice plans, it required that students be given an annual choice of school without interference by the school board and that students be assigned to a school on a nonracial basis if they fail to make a choice; and that the faculties and operating staffs be desegregated. Further, that district courts should retain jurisdiction in school desegregation cases to insure that a constitutionally acceptable plan is adopted, and that it is operated in a constitutionally permissible fashion so that the goal of a desegregated nonracially operated system is rapidly and finally achieved.

The court concluded that the Altheimer school district will not be fully desegregated or the Negro plaintiffs assured of their constitutional rights as long as the Negro school clearly remained so identifiable. While aware that it will be difficult to desegregate the Negro school, the court noted that the school board had taken no steps to change its identity in that it made no effort to employ or assign white faculty members to the Negro school, modify its bus transportation policy, alter its construction program, or provide the Negro school with sufficient funds to correct its unequal resources and heavier class load. Although the court adhered to its view that school desegregation could be accomplished under a freedom-of-choice plan, it disapproved the manner in which the Altheimer school district had met its responsibilities to desegregate the school system.

In the opinion of the court, the policies and practices of the school district with respect to students, faculty, facilities, transportation, and school expenditures have been designed to discourage the desegregation of the school system and have had that effect. Therefore, the decision of the district court dismissing the complaint was reversed, and the case remanded with instructions that jurisdiction be retained to assure that the school district carries out a detailed plan for the operation of the school system in a constitutional manner.

In its decree, the court approved of a freedom-of-choice plan as outlined by the HEW guidelines until it becomes clear that the school system cannot become desegregated under such guidelines. Complete faculty desegregation was ordered not later than the beginning of the 1969-70 school year. To this end, vacancies must be filled, when possible, with qualified Negro teachers at the formerly all-white school and with qualified white teachers in the Negro school; immediate steps must be taken to encourage full-time teachers to transfer between the two schools, but if there are not sufficient volunteers, the board must make assignments to place white teachers in the Negro school and Negro teachers in the white school; and inequalities between white and Negro teachers with respect to salaries and teaching load based on racial considerations must be eliminated.

In addition, the court ordered that a new bus transportation plan be established, that plans for new construction be submitted for court approval, with new facilities to be designed and to be built with the objective of eradicating the vestiges of a dual school system; and that prompt steps be taken to equalize the Negro and white schools with respect to library facilities, pupil-teacher ratios, and school accreditation.

Raney v. Board of Education of Gould School District

381 F. (2d) 252
United States Court of Appeals, Eighth Circuit, August 9, 1967; rehearing denied, August 18, 1967.
Certiorari granted, 88 S. Ct. 783, January 15, 1968.

Parents and friends of certain minor Negro students sought to enjoin the Gould Board of Education from requiring the students to attend a named all-Negro school; providing inferior school facilities for Negro pupils; and otherwise operating a segregated system. Plaintiffs further sought to have all future construction located on or near the site of the predominantly white Gould High School.

The trial court refused to grant the injunction, and appeal followed on the following issues: Whether the court "is authorized to tell the school board where to build or not to build a new school building, and second, should the court do so under the circumstances in this case?"

The appellate court affirmed the trial court decision. It found that the voluntarily adopted "freedom of choice" desegregation plan went beyond the minimum requirement of the Department of Health, Education, and Welfare. The choice of sites for the construction of a new structure to replace the Negro high school was made on the basis of sound, racially nondiscriminatory administrative reasons, and a school built on the site was virtually certain to be integrated in view of the progress of integration and building space limitations.

Although the issue of adequacy of the desegregation plan was not raised in the lower court, the appellate court, nevertheless, found "no substantial evidence to support a finding that the board was not proceeding to carry out the plan in good faith."

The Supreme Court of the United States agreed to hear plaintiffs' appeal from this decision.

Note: In accord with its holding in Green v. County School Board of New Kent County, Virginia, (see p. 42 of this report) the Supreme Court of the United States ruled that the "freedom of choice" plan in the circumstances of this case was inadequate to convert the dual school system into a unitary, nonracial school system. Here, as in the Green case, there was no residential segregation, and in the three years of the operation of the freedom-of-choice plan over 85 percent of the Negro children attended Negro schools and no single white child had sought to enroll in the Negro school. In view of inadequacy of the plan, the board must take steps to formulate a new plan that promises realistically to promptly convert the school system into a unitary nonracial one.

The Court held further that in the circumstances of the case, the dismissal of the complaint by the district court was an improper exercise of discretion and inconsistent with the responsibility imposed on the district courts by the second Brown school desegregation decision which contemplated retention of jurisdiction until it is clear that disestablishment of a state-imposed segregated school system has been achieved. Judgment was reversed and the case remanded for further proceedings consistent with this opinion and the opinion in the Green case. (36 Law Week 4483, May 27, 1968.)

Robinson v. Willisville School District
379 F. (2d) 289
United States Court of Appeals, Eighth Circuit,
July 5, 1967.

In this class action, students sought a temporary and a permanent injunction against the Willisville School District to prevent it from denying them and others in their class admittance to the district's only school and from refusing to provide transportation because of their race or color.

The Willisville School District operated only one school, a segregated all-white school until the beginning of the 1966-67 school year when it instituted a plan of desegregation. The plan allowed the students to choose between attending Willisville or Oak Grove, an all-Negro school district established in the 1930's to provide public education for Negro children residing in the Willisville School District and several other surrounding districts. About 70 Negro students within the Willisville District who previously had attended Oak Grove chose to attend Willisville, and 30 of these were accepted. The rest were all residents of County Line, a community located about six miles from Willisville and 15 miles from Oak Grove.

Oak Grove had sought for several months to obtain the permission of the Department of Health, Education, and Welfare to annex the County Line community into its district, but permission was refused. It then sought and was refused permission by HEW (the district relied heavily on federal aid to support its school system) to have the County Line students continue to attend Oak Grove through the 1966-67 school year. Consequently, both school districts refused to accept the plaintiff-students.

The Willisville School District denied that its refusal to admit anyone to its public school was because of race or color, and stated that its sole motivation was its lack of ability to accommodate the additional pupils and inability to provide bus transportation for the 1966-67 school year. The Willisville district requested that it be allowed to file a third-party complaint making Oak Grove a party to the action, and prayed that Oak Grove be required to admit the students for the remainder of the year.

The order of the trial court allowed the filing of the third-party complaint and required that Oak Grove accept students of County Line immediately, that all Negro senior students be given choice of schools for the second semester, and that the Willisville district submit a plan for desegregation.

The students appealed, claiming that the failure of the court to order their admission into Willisville denied them equal protection of the law, that Oak Grove was not proper party, and that the trial court erred by ordering the school board to submit a desegregation plan since no plan was needed where there was only one school in the district.

The appellate court affirmed the lower court order, but reserved opinion as to whether a plan of desegregation which permits students of either or both of the districts to choose the district they desire to attend comports with the Constitution. The case was remanded for full evidentiary hearing on this issue, with instruction that the court retain jurisdiction for a sufficient time to insure that the plan, as approved, is carried out and that a desegregated nonracially operated school district is rapidly and finally achieved.

Yarbrough v. Hulbert-West Memphis School District No. 4, of Crittenden County, Arkansas
380 F. (2d) 962
United States Court of Appeals, Eighth Circuit, July 26, 1967.

(See Pupil's Day in Court: Review of 1965, p. 18.)

Negro school children instituted a class suit in January 1965 against the school district, the members of the school board, and the school superintendent, contending they were being deprived of their Fourteenth Amendment rights. They asked for injunctive relief or for a decree directing the school authorities to present a plan to reorganize the school system as to students and faculty on a nonracial basis.

After a hearing in March 1965, the district court ordered the school authorities to desegregate the schools and gave them an opportunity to formulate and file a desegregation plan. The plan submitted and approved in June 1965 called for desegregation of all grades by 1967-68 under freedom-of-choice procedures, for nondiscriminatory bus transportation beginning in the fall of 1965, for desegregation of faculty meetings and inservice workshops and for undertaking and completing "as expeditiously as possible the desegregation of the teachers and professional staff."

Subsequently the plan was amended in several respects to provide for school assignment preferences annually, to eliminate biracial attendance zones and to require a report to the district court by a specified date as to the status of teacher and staff desegregation. The amended plan received the approval of the district court. As further amended in September 1966, the plan recited the steps taken by the school district with respect to teacher desegregation. Plaintiffs, however, objected that the faculty desegregation plan was vague and nonspecific, citing data that hiring and assignment on a segregated basis continued in the 1966-67 school year.

The district court concluded that the steps taken by the school authorities "represent a meaningful start toward desegregation of the faculty and may be constitutionally adequate for the time being." However, the court felt that the report lacked concrete expressions of intent of the board and should be amplified to contain a declaration of policy for the filling of teaching and staff vacancies. Upon amendment of the plan as suggested, the court approved the plan and dismissed the case.

The two issues presented in this appeal by Negro plaintiffs concerned the features of the plan relating to faculty and staff integration and the failure of the district court to retain jurisdiction of the case.

On the issue of faculty desegregation, the appellate court repeated the standards set for this circuit in Clark v. Board of Education of Little Rock School District (see page 19 of this report) which include that school boards must take accelerated and positive action to end discriminatory practices in assignment and recruitment and should make all additional positive commitments necessary to bring about some measure of racial balance in staffs of the individual schools in the very near future.

As to a remedy in the instant case, the court decided, although not without some hesitancy, not to lay down any mathematical formula or a fixed time table for faculty desegregation. On the record of progress of school desegregation in this district, the court chose to firmly suggest that a substantial forward step be forthcoming in 1967-68 and that complete faculty and staff desegregation take place by no later than the start of the 1969-70 school year.

The dismissal of the action by the district court was vacated and the case was remanded with direction that jurisdiction be retained and for further timely proceedings in accord with the views expressed in this opinion.

District of Columbia

Hobson v. Hansen
265 F. Supp. 902
United States District Court, District of Columbia, February 9, 1967.

(See case digest below)

In this phase of the action against the District of Columbia schools, plaintiffs sought a declaratory judgment and injunction forbidding the exercise of authority by members of the District of Columbia Board of Education on the ground that Section 31-101 of the District of Columbia Code, under which they were appointed, was unconstitutional. This section provided that board members be appointed by the judges of the United States District Court for the District of Columbia.

The court held that under Article I, Sec. 8, Clause 17, of the federal Constitution, Congress was empowered to enact the section of the District of Columbia Code requiring school-board members to be appointed by the judges of the United States District Court for the District of Columbia.

Hobson v. Hansen
269 F. Supp. 401
United States District Court, District of Columbia, June 19, 1967, and September 11, 1967.

A class action was brought in the federal district court against the District of Columbia

Board of Education, the members of the school board as individuals, and the school superintendent. The case was tried on its merits before Circuit Judge Skelly Wright of the U. S. Circuit Court of Appeals for the District of Columbia, sitting as a trial judge by designation.

The basic question presented was whether the defendants in the operation of the District of Columbia public school system unconstitutionally deprived the District's Negro and poor public-school children of their right to equal educational opportunity with the District's white and more affluent public-school children. The court concluded that Negro and poor public-school children were being unconstitutionally deprived of their right to equal educational opportunity. In support of this conclusion, the court made principal fact findings, among them:

1. That racially and socially homogeneous schools damage the minds and spirits of all children who attend them--the Negro, the white, the poor, and the affluent

2. That the scholastic achievement of disadvantaged children, Negro and white, is strongly related to the racial and socio-economic composition of the student body of the schools they attend and a racially and socially integrated school environment increases the scholastic achievement of disadvantaged children

3. That the nine-member board of education of the District of Columbia is appointed pursuant to a quota system, and that since 1962, Negroes on the board have been one less than a majority in a city with a present population over 60 percent Negro and a school population over 90 percent Negro.

4. That adherence to the neighborhood school policy effectively segregates the Negro and poor children from the white and more affluent children in most of the public schools, and the board's relaxation of this policy through optional zones in certain areas for the purpose of allowing white children in a Negro school district to "escape" to a white or more nearly white school, makes the economic and social segregation more complete than it would otherwise be under a strict neighborhood school assignment plan

5. That teachers and principals have been assigned to schools so that generally the race of the faculty and the children in a school are the same, with the heaviest concentration of Negro faculty, usually 100 percent, in the Negro ghetto schools

6. That the median annual per-pupil expenditure of $292 in predominantly Negro elementary schools was $100 lower than the median annual per-pupil expenditure of $392 in the predominantly white elementary schools

7. That white elementary schools were underpopulated and all had kindergartens while the Negro schools were overcrowded, some had no kindergartens at all, others had kindergartens in shifts, and in addition to overcrowding and shortage of kindergarten space, the school buildings in the Negro slum areas were ancient and run down

8. That the school system operated a track system of ability grouping and that aptitude tests used to assign children to the various tracks are standardized primarily on white middle class children; these tests do not relate to the Negro and disadvantaged children who on the basis of these tests are relegated to lower tracks from which the chance of escape is remote because of reduced curricula and the absence of remedial and compensatory education and continued inappropriate testing

9. That the education in the lower track is geared to the "blue-collar" students, and thus such children so stigmatized by inappropriate aptitude testing procedures, are denied equal opportunity to obtain a white-collar education available to white and more affluent children.

To correct the racial and economic discrimination it found to exist in the operation of the District of Columbia public school system, the court issued a decree which ordered an injunction against racial and economic discrimination in the D. C. public school system, immediate abolition of the track system and the optional attendance zones, transportation for volunteering children from overcrowded Negro schools to underpopulated predominantly white schools; substantial integration of the faculty of each school beginning with the 1967-68 school year; and the filing for approval of the court by October 2, 1967, of plans for pupil assignment, eliminating racial and economic discrimination in the schools, and for fully integrating the faculty in each school.

The extensive opinion contained detailed findings of fact as well as an exposition of the constitutional principles on which the court's holdings and decree were based. The court found that the inequalities in the predominantly Negro schools, as evidenced in the programs, facilities, teacher assignment, and overcrowding, denied the children equal educational opportunity and equal protection of the law. The creation of certain optional attendance zones as exceptions to the neighborhood school policy, which permitted an escape valve for white pupils (even through Negro pupils could also transfer out) was held to have produced de jure constitutional violations.

The court found that intentional teacher and principal segregation persisted in the school system and this was plainly defective constitutionally, and that token integration that has been carried out has not cured the defect. In this regard, the court said that the Negro students' equal protection rights to an integrated faculty cannot be thwarted by the racially induced preferences of the teachers who are public officials whose actions are subject to constitutional criteria. As to the remedy to correct the illegalities in teacher placement, the court said that (a) willful segregation in the assignment process must cease; if preference of teachers and principals are to be relied on in making assignments, measures must be taken to make sure that race does not enter into the expression of preferences; and (b) the assignment of incoming teachers must proceed on a color-conscious basis to insure substantial and rapid teacher integration. To the extent that these two measures are unable quickly to achieve sufficient faculty integration in the schools, then a substantial reassignment of the present teachers, including those with tenure, would be mandatory.

De facto segregation in the District of Columbia was also considered by the court. The opinion noted that the Supreme Court has not yet decided or considered whether de facto segregation falls under the Brown proscription. But in assessing de facto segregation in the D. C. public schools, the court held that the neighborhood school policy as presently administered, with deliberate teacher segregation, with optional zones, and with objective inequalities between the Negro and the white schools as reflected in the findings, results in harm to Negro children and society which cannot constitutionally be fully justified. To mitigate the effects of de facto segregation, the court directed the school board to provide public transportation to Negro pupils who volunteer to transfer to predominantly white schools where space is available.

The use of a neighborhood policy, intentionally manipulated in some instances, was held by the court to be the primary cause of pupil assignment discrimination. But because of the 10 to 1 ratio of Negro to white children in the D. C. public schools and because the neighborhood policy is accepted and used throughout the country, its use in the District of Columbia was not barred at this time. The court told the school board that in preparing its plan to alleviate pupil segregation, it should consider the advisability of establishing educational parks, particularly at junior and senior high-school levels, school pairings, and other approaches to maximize pupil integration. But where because of the density of residential segregation or for other reasons, children in certain areas are denied the benefits of an integrated education, the plan must include compensatory education to at least overcome the detriment of segregation and to provide as nearly as possible equal educational opportunities to all children. Further, in the formulation of an integration plan, the school board should explore the possibility of cooperation with suburban school districts in the metropolitan Washington areas.

The court abolished the track system because it was found to discriminate against the disadvantaged child, particularly the Negro, thereby denying a majority of the District pupils their constitutional right of equal educational opportunities. In so holding, the court made it clear that the issue was not whether the school authorities are entitled to provide different types of students with different types of education, and that it was not condemning ability groupings as such.

Following its June 19, 1967, decision, on motion of the school board, the court amended its decree to permit those students who at the close of the 1966-67 school year were attending schools open to them under the former optional zones to continue to attend such schools if they so desired, until further action by the court.

Florida

Steele v. Board of Public Instruction of Leon County, Florida
371 F. (2d) 395
United States Court of Appeals, Fifth Circuit, January 18, 1967.

On April 22, 1963, the federal district court approved the desegregation plan of the Leon County Board of Public Instruction, the defendant in this action. On May 7, 1964, plaintiffs moved for further relief, seeking acceleration of the plan and requesting a unitary school system based on geographical attendance lines for grades 1-6. On January 20, 1965, the court found the school board to be in compliance with its initial order of April 22, 1963, but plaintiffs moved for a hearing, noting that the courts' last order did not mention the reorganization requested. On April 5, 1965, plaintiffs renewed their motion for a hearing and asked for clarification regarding whether the court intended to deny the motion for further relief in the order of January 20, 1965. On April 7, 1965, the court granted the motion for clarification, stating that the motion for further relief had been denied because it sought to change the basic structure of the desegregation plan. Plaintiffs appealed this order and defendants contended that the order was nonappealable.

The appellate court held that the order of April 7, 1965, denying plaintiffs' motion to modify the plan was an appealable interlocutory order. Citing its Jefferson County decision, the court noted that it had approved in principle free choice school desegregation plans, provided they met certain standards. Until the district court, after a hearing, is convinced that the freedom-of-choice plan where used does not work, the court need not require school authorities to shift to a plan based on geographic attendance zones. Since the plan in the instant case failed in several respects to meet the Jefferson standard, it must be modified, the appellate court held.

Therefore, the April 7, 1965, order of the district court was vacated and the case remanded for further consideration. The court stated that a hearing might be appropriate if the district court found it desirable to receive evidence and hear arguments on the advantages of a unitary plan based on zoning.

Georgia

Griggs v. Cook
272 F. Supp. 163
United States District Court, Northern District of Georgia, Atlanta Division, July 21, 1967.

Negro property owners for themselves and on behalf of Negro parents of school-age children sought to enjoin the use of their property as the site of a new school on the grounds that building at that location would perpetuate racial segregation. The school board moved to dismiss the action on the ground that it was motivated by the plaintiffs' interest in preserving their property ownership, but the court ruled that a party may have standing to sue, however suspect the motive might be.

The issue before the district court was whether the proposed location of the school is unconstitutional because it will result in a predominantly Negro enrollment and would violate the decree of the Fifth Circuit Court of Appeals in United States v. Jefferson County Board of Education, 380 F. (2d) 385 (1967), (see page 16 of this report) which provides that "to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system."

The court denied the injunction, finding that the school-board consideration of such factors, among others, as the desire and need for a school, program requirements, coordination with street, parks, planning, zoning, and urban renewal departments working on other projects in the area, accessibility, safety, traffic and cost "all fall within the accepted standards of 'economy, convenience, and education.'" Likewise, the rejection of alternate sites was based on accepted standards. The court further found that while the use of the proposed site would undoubtedly produce an all-Negro school, the use of any of the alternate sites would also lead to a similar result because of Atlanta's racial housing pattern. The evidence revealed that a school in the vicinity was long demanded by the Negro residents, yet "only the particular site is attacked as racially intolerable." Because of the de facto residential practices of Atlanta, the court was faced with the choice of either allowing the construction of an all-Negro school or denying the area students a school within a reasonable distance of their homes. Deciding upon the first alternative, the court held that "the establishment of a school on nonracially motivated standards is not unconstitutional because it fortuitously results in all-Negro or all-white enrollment. The need for education under reasonable conditions supersedes the need for absolute integrated education under unreasonable conditions."

On appeal, the Fifth Circuit Court of Appeals found the proposed school construction to be consistent with the requirements of the Jefferson County decision. Judgment denying injunctive relief was affirmed. (___ F. (2d) ___, October 24, 1967.)

Mallard v. Warren
152 S.E. (2d) 380
Supreme Court of Georgia, November 15, 1966; rehearing denied, November 23, 1966.

A group of taxpayers and school patrons of the Odum Educational District of Wayne County brought suit against the Wayne County school board and its superintendent, complaining of the reassignment of children from grades 10 to 12 of the Odum High School to more distant schools in the city of Jesup. The complaint alleged this action was in compliance with the school board's agreement with U. S. Department of Health, Education, and Welfare, to achieve a better racial balance in the Jesup schools, but that this action was in violation of the board's prior resolution prohibiting the transportation of children out of their attendance area by county school busses; also that the action was contrary to the best interests of the children and to certain state and federal constitutional provisions.

Among other relief requested, the court was petitioned for an order to require the board to hold a hearing and decision on the controversy, to compel compliance with its prior resolution on transportation, and for an injunction to prevent the assignment and transportation of the pupils to the Jesup schools. The trial court sustained defendants' objections to the suit on a number of grounds, including failure to allege a cause of action.

A state statute provides that a local school board shall constitute a tribunal for a hearing and determination of any matter of local con-

controversy relating to the construction or administration of school law, with right of appeal from its decision to the state board of education. This statute has been judicially construed to mean that complaining parties have a right to be heard before the board sitting as a court. Since under this statute petitioners have a legal right to a hearing before the school board on matters in controversy and their request for a hearing has been refused, the court held that the petition alleged at least a cause of action for the issuance of a writ of mandate requiring the county board to provide a hearing.

Indiana

Copeland v. South Bend Community School Corporation
376 F. (2d) 585
United States Court of Appeals, Seventh Circuit, May 8, 1967.

In December 1966 while school was in session, a classroom ceiling collapsed but with no resulting injuries. The school was closed before the regular Christmas recess. Negro school children filed suit for declaratory judgment and for injunctive relief, seeking, among other issues relating to school segregation not involved in this appeal, to keep the school closed after Christmas recess on the grounds that it was unsafe and inadequate.

The lower court denied the motion for a preliminary injunction after hearing expert testimony presented by both sides. The lower court found that the building was structurally and otherwise sound and safe and did not constitute a safety or health hazard, that no overcrowding condition existed, and that the school was safe and suitable for continued occupancy by its regularly enrolled students.

The appellate court affirmed the decision, declaring that it did not find either "abuse of discretion" or that the underlying findings were "clearly erroneous," and that the findings supported the conclusion that no constitutional rights were denied by reason of the issue raised by the motion for a preliminary injunction.

Louisiana

Bossier Parish School Board v. Lemon
370 F. (2d) 847
United States Court of Appeals, Fifth Circuit, January 5, 1967; rehearing denied February 6, 1967.
Certiorari denied, 87 S. Ct. 2116, June 12, 1967.

(See Pupil's Day in Court: Review of 1964, p. 22-24.)

Negro Air Force personnel sought to enroll their children in a white parish school near their military base. The local school board denied the Negro children who were enrolled in Negro schools in the parish the right to attend the white school on grounds that they were not within the jurisdiction of the state, but were living in a federal enclave. The school board argued that the Fourteenth Amendment provides that no state may deny equal protection of laws to any person within its jurisdiction; and since the children at the military base are not within the jurisdiction of the state they have no right to attend the parish schools, and are permitted to do so by sufferance, which permission may be withdrawn at any time.

A district court denied the board's motion to dismiss the action, granted the summary judgment to the Negro parents, and issued an injunction ordering the school authorities to submit a desegregation plan for parish public schools. The decision was affirmed on appeal.

The district court had found that the federal government had provided financial aid to the parish school system in return for assurances by the school board that military base children would be admitted to schools on the same basis as other school children in the school district; and that there was no Louisiana law which required school boards to maintain segregated schools. Further, that when the board received and accepted federal school funds, subsequent to the passage of the 1964 Civil Rights Act, it became bound by the provisions of this act and was obliged to provide the education for which the payments were received, without racial discrimination. Consequently, the Negro parents were entitled to bring an action under the Civil Rights Act or under contractual assurances which estopped the board from denying to the Negro children their right to attend desegregated schools.

The appellate court adopted the decision and reasoning of the district court, and added that even if the school board was not legally obligated to educate children of military personnel, it could not provide that education subject to unconstitutional conditions. Once the Negro children of personnel on the military base had been admitted to the school system, they had a constitutional right to desegregated education. And once the Negroes established their constitutional right to have their children attend the parish schools, their standing to sue to assert such federal rights followed automatically.

The Supreme Court of the United States denied a petition for a writ of certiorari for a review of this case.

Hall v. St. Helena Parish School Board
Williams v. Iberville Parish School Board
Boyd v. Pointe Coupee Parish School Board
Dunn v. Livingston Parish School Board
Thomas v. West Baton Rouge Parish School Board
Carter v. School Board of West Feliciana Parish
George v. Davis
Charles v. Ascension Parish School Board
268 F. Supp. 923
United States District Court, Eastern District, Louisiana, Baton Rouge Division, May 19, 1967.

The United States Government as an intervening plaintiff in each of these consolidated cases, filed motions for additional or supplemental relief, seeking certain changes in the plans for desegregation of schools previously entered by the court. It was asserted that the decree entered was not the same as the decree entered by the U. S. Court of Appeals in United States of America v. Jefferson County Board of Education, 380 F. (2d) 385 (1967).

The question raised was whether or not the plaintiffs' had proved by a preponderance of the evidence that the decrees now in effect do not meet constitutional standards, and whether they are entitled to the relief sought.

The court held that plaintiffs completely failed to carry their burden of proving that they were entitled to any change in the desegregation plans in operation in their school systems with respect to the pupils' freedom of choice. It declared that for the court to hold that "it is bound to enter the decree formulated by the Appellate Court in Jefferson, without regard to the proofs offered in the present case merely because the Court of Appeals recognized what it believed to be a desirability of uniformity in decrees entered in cases of this sort, would be to recognize a fact which simply does not exist, i.e., that the Court of Appeals has the right to render advisory opinions."

The court found, however, that the evidence did show that changes in other portions of the desegregation plans, particularly those pertaining to speed of desegregation, transportation, desegregation of faculty, facilities, activities, and programs and to school equalization, were needed in order to meet constitutional standards as defined by the U. S. Court of Appeals for the Fifth Circuit and orders were entered accordingly.

St. Augustine High School v. Louisiana High School Athletic Association
270 F. Supp. 767
United States District Court, Eastern District of Louisiana, New Orleans Division, July 6, 1967.

A class action was brought by the all-Negro private St. Augustine High School, seeking admission to membership in the Louisiana High School Athletic Association. Until 1962, the association membership consisted of Louisiana high schools with all-white student bodies and faculties. Thereafter, membership was made up of formerly all-white schools, now integrated by court orders. Of the approximately 400 member schools, 85 percent are public schools and 15 percent are privately owned and operated.

St. Augustine is scholastically an outstanding school, with 75 to 80 percent of its graduates going on to college. Its athletic program has one of the finest achievement records in the state. In the summer of 1964 the school filed an application for membership in the association, in accordance with all the rules and regulations then in effect. However, the application was not acted upon by the association's executive committee, for its constitution was amended, drastically changing the procedure for the admission of new members. In addition to previous procedural requirements, applicants were required to obtain the approval of two-thirds of the member schools present at the annual state meeting. Pursuant to the procedural changes, St. Augustine overcame every obstacle except that it did not receive the necessary two-thirds affirmative vote of the member schools. Of all the applications which were approved at the district level, only St. Augustine was refused admission by the association's general assembly.

The court held that the Louisiana High School Athletic Association is, for all intents and purposes, an agency of the state, and consequently any discrimination by the association is forbidden by the Fourteenth Amendment. This conclusion was based on the fact that the membership of the association was composed mostly of public schools and on other factors of state involvement in the interscholastic athletic program, such as the reliance of the association on state funds, facilities, and other state resources, the association's coordinating and sponsoring function of the athletic program, and the authority the association exercises over the public schools in connection therewith.

The court rejected the arguments that the association had not discriminated against St. Augustine in denying it membership. The court was convinced that the school and its students had been denied membership solely because, in fact, its students happen to be Negroes.

Finally, the court found that St. Augustine's inability to meet the last requirement for admission--the approval of two-thirds of the member schools--was due to the arbitrary and capricious vote of the membership and constituted a deprivation of plaintiffs' constitutional rights.

An order was entered requiring the association to immediately admit the St. Augustine school into full membership into the association, prohibiting the association to deny membership to any high school by arbitrary vote of the membership or on any other qualification or standard not expressly established by the association and as stated in its constitution and bylaws, requiring the association to specify grounds when admission is denied, and enjoining racially discriminatory practices in any form.

The order did not bar the association from establishing reasonable and nondiscriminatory objective qualifications for membership.

United States v. Jefferson County Board of Education
372 F. (2d) 836
United States Court of Appeals, Fifth Circuit, December 29, 1966; rehearing, En Banc, 380 F. (2d) 385, March 29, 1967.

(See page 16 for Louisiana cases under this title.)

Maryland

Bernstein v. Board of Education of Prince George's County
226 A. (2d) 243
Court of Appeals of Maryland, February 13, 1967.

(See page 10.)

Massachusetts

School Committee of Boston v. Board of Education
227 N. E. (2d) 729
Supreme Judicial Court of Massachusetts, Suffolk, June 9, 1967.

A declaratory judgment action was brought by the Boston school committee against the state board of education and the state commissioner of education with respect to the constitutionality of the 1965 Massachusetts racial balance act.

The act provides for the elimination of racial imbalance in public schools. Under its provisions, racial imbalance is deemed to exist when the percent of nonwhite students in any school exceeds 50 percent of the total number of students in the school. The act requires each school committee to submit annual statistics to the state board of education, showing the distribution of white and nonwhite students in each school. Whenever racial imbalance is found to exist, the school committee, upon written notice by the state board of education, must prepare a plan to eliminate the imbalance and file a copy with the state board. If no progress toward elimination of racial imbalance is shown within a reasonable time, the commissioner of education may order state funds to be withheld from the local school system until an acceptable plan has been received.

The Boston school committee furnished the required statistics which disclosed that 25 percent of the public elementary-school students attended 38 racially imbalanced schools. Plans to eliminate racial balance in the Boston schools filed by the school committee were deemed to be inadequate by the state board.

The court ruled that the Massachusetts racial balance act was constitutional. In so holding, the court rejected arguments of the Boston school committee that the act violated the due process clause of the Fourteenth Amendment and provisions of the state constitution because of vagueness in that it furnished no criteria for classifying students as white and nonwhite, or because the act failed to grant a hearing to the school committee on the proposed plans and the state board's action on them. Also overruled was the contention that the act violated the equal protection clause of the Fourteenth Amendment. The court said that it is unimpressed with the argument that the act works a denial of equal protection unless it can be shown that in fact a pupil has been excluded from a public school on account of race.

Michigan

Mason v. Board of Education of the School District of the City of Flint
149 N. W. (2d) 239
Court of Appeals of Michigan, Division 2, March 28, 1967.

Plaintiff, a guardian ad litem for approximately 100 students residing in the Flint school district, sought a declaratory judgment directing the board of education to allow students to attend the school they formerly attended or, in the alternative, any school of their choice. In the fall of 1964, in anticipation of the opening of a fourth high school, new boundary lines were established based on building capacity, stability of boundary lines, transportation lines, and neighborhoods representative of school population (racial balance).

It was plaintiff's charge that the board attempted to achieve an equal percentage of races in each school house, thus allegedly depriving students represented by plaintiff of the equal protection of law guaranteed by the Fourteenth Amendment and under a provision of the Michigan Constitution. The constitutional issue before the trial court was whether the board of education may consider racial balance as a criterion in establishing boundary lines of high-school areas.

The trial court entered judgment permanently restraining school board from considering racial balance as a criterion. On appeal by the school board, this judgment was reversed. The appellate court found that no one was deprived of equal protection by a board's consideration of racial balance as one criterion in setting attendance areas.

Mississippi

United States v. Natchez Special Municipal Separate School District
267 F. Supp. 614
United States District Court, Southern District of Mississippi, Western Division, January 28, 1966.

The United States objected to a school desegregation plan filed pursuant to a court order of October 1965, which called for integration of the Natchez schools in September 1966. It was argued that the integration plan should be commenced at the second semester of the 1965-66 school season which convened on January 24, 1966. The second semester had already commenced when the complaint was heard.

The court upheld its original desegregation plan as in substantial compliance with the order of the court and declared that an order "at this time requiring immediate integration of two grades in the high schools would result in a complete demoralization of the school planned program." The initial complaint was not filed until after the August 1965 registration period had ended. Since a school session requires "considerable advanced study, planning and prearrangement," the institution of a court-inspired plan after commencement of the semester "would be made with no knowledge or idea of its effect; and with no intelligent arrangement for its proper execution and would result in vastly more injury than help to students of both races."

New Jersey

Elliot v. Board of Education of Neptune Township
228 A. (2d) 696
Superior Court of New Jersey, Appellate Division, April 10, 1967.

The state commissioner of education found that de facto racial imbalance existed in the elementary school system of Neptune Township and ordered the board of education to present an approved plan to alleviate the racial imbalance for implementation at the beginning of the 1966-67 school year. The local school board did not submit a plan throughout the proceedings, but appealed from a decision of the state board of education affirming the decision of the commisioner. The local school board contended that the commissioner should have conducted a full hearing to consider factors such as convenience, safety, time, economy, and costs.

The court rejected this contention, noting that the commissioner was directed only to determine whether de facto segregation existed. A finding that two schools contained a 98 percent and 99 percent nonwhite student body, while three other schools contained student bodies of 1 percent, 1 percent, and 2 percent nonwhite origin was sufficient to support the commissioner's findings of de facto racial imbalance.

The court pointed out that the factors relied upon by the board as posing questions of fact relate to an entirely different matter--whether a given integration plan is acceptable. Such factors would properly be the subject of consideration, the court said, when the township actually proposed a plan for integration.

New York

Bryant v. Board of Education of City of Mount Vernon, New York
274 F. Supp. 270
United States District Court, S.D. New York, September 27, 1967.

Negro parents of school children in Mount Vernon, sought a decree (a) to enjoin the school and the school superintendent from maintaining a neighborhood school policy pursuant to which, it was alleged, their children are assigned to schools on the basis of race; and (b) to direct the school authorities to adopt a plan resulting in the assignment of pupils to a school without regard to race.

Plaintiffs contended that intentional racial discrimination was practiced in two respects. First, that between 1945 and 1955, 49 white pupils were permitted to transfer from an alleged predominantly Negro school in the area where they resided to other predominantly white schools. Second, that in 1945 and again in 1955, attendance zone lines for certain schools had been gerrymandered with the intention of removing white pupils from predominantly Negro schools to predominantly white schools.

On the alleged improper permissive transfers, the court found the school authorities had produced facts which completely disproved the contention that the board permitted the transfer of white children to escape predominantly Negro schools.

As to the alleged gerrymandering in the two redistrictings of the elementary schools, the court found nothing in the record before it to warrant a trial on the issue of gerrymandering. The evidence submitted showed that the changes in school boundaries in 1945 and again in 1955 were to relieve overcrowding in certain schools, and that the changes were not boundary manipulations which in either effect or design, materially contributed to the racial imbalance in the Mount Vernon elementary schools.

The court took note of present serious problems in racial imbalance in the Mount Vernon elementary schools and of the efforts and steps taken by the school administration under the supervision and direction of the state commissioner of education to overcome the racial imbalance and to provide quality education for all without regard to race.

Upon the record, the court concluded that judicial intervention was not justified. Motion for summary judgment dismissing the complaint was granted.

Johnson v. Hunger
266 F. Supp. 590
United States District Court, S. D. New York, March 22, 1967.

The parents of school children in Poughkeepsie, New York, sought to enjoin alleged racial segregation in the public school system.

The court dismissed the amended complaint for failure to offer competent proof through affidavits of persons having first-hand knowledge of the facts and for failure to furnish facts showing that a prima facie case of racial segregation existed or was threatened, warranting the issuance of injunctive relief.

In contrast to the absence of such supporting affidavits, the court noted that the superintendent of schools presented an affidavit revealing that "in every school attended by Negroes there was also a very substantial percentage of white students, ranging from 59 percent to 86 percent in the two junior high schools and from 40 percent to 68 percent in the three elementary schools alleged to be the subject of Negro concentration." The court noted that the situation represents a far cry from the 94 percent to 100 percent Negro attendance involved in the Supreme Court of the United States findings of racial segregation.

Offermann v. Nitkowski
378 F. (2d) 22
United States Court of Appeals, Second Circuit, May 19, 1967.

(See Pupil's Day in Court: Review of 1966, p. 23.)

A group of white parents appealed from a judgment of the lower court dismissing their action for a declaratory judgment and injunction against the Buffalo superintendent of schools and board of education, the commissioner of education and the board of regents of the state of New York to prevent them from executing a pupil placement plan.

The parents argued that the plan to correct the de facto racial imbalance in the Buffalo school system was unconstitutional because it was based on proscribed racial classifications, that is, alterations in school district boundaries, and because the allowance of exceptions to the requirement that children attend neighborhood schools was based on race.

The court affirmed the decision of the lower court and held that the plan adopted by the school authorities to eliminate de facto segregation did not violate any constitutional right of the complaining parents.

The court noted that in carrying out the mandates of the two Supreme Court decisions in Brown v. Board of Education, that desegregation of the public schools proceed with all deliberate speed, "states necessarily based their desegregation plans on racial classification and the courts uniformly held such classification constitutional." While the courts generally hold that communities have no constitutional duty to end bona fide de facto segregation, such an effort when attempted is not unconstitutional, the court declared. "Since Brown is the law, some attention to color count is necessary to see that it is not violated, for it affirmatively requires admission to public schools on a racially non-discriminating basis." Only the use of race as a basis for unequal treatment is prohibited.

The court also ruled that the district court did not err in refusing to convene a three-judge court since the question presented was insubstantial.

North Carolina

Coppedge v. Franklin County Board of Education
273 F. Supp. 289
United States District Court, Eastern District, North Carolina, Raleigh Division, August 21, 1967.

Negro children instituted a class action in December 1965 to desegregate the Franklin County, North Carolina, public school system after the school authorities had adopted a freedom-of-choice plan. The gradual plan, which included provisions for lateral transfers in the nondesegregated grades under certain circumstances, went into operation at the start of the 1965-66 school year. After the suit was filed, the U. S. Government asked for and was granted court permission to join as a plaintiff-intervenor.

The lateral transfer provision was a principal issue in an earlier hearing of this case for a preliminary injunction. While stating that it did not sanction the failure of the school authorities to give proper notice of the criteria for lateral transfers, the court found that they had acted in good faith. The motion for a preliminary injunction was denied on the grounds that it was not in the best interests of the Negro plaintiffs to transfer to other schools in midterm.

A hearing for a permanent injunction was set for July 1966. The main issues related to faculty desegregation and the adequacy of the freedom-of-choice method of school assignment in an atmosphere of community hostility to desegregation and intimidation of Negroes. After extensive conferences between the court and counsel for all parties, the court issued an interim order which directed the school board to conduct a new freedom-of-choice enrollment period, and enjoined it from engaging in any act, practice, or policy of racial discrimination in the operation of the county public school system. The board was also enjoined from racial discrimination in staff and faculty assignment and employment and was directed to fill vacant positions with the best qualified applicants regardless of race, to encourage transfers of the present faculty members so as to eliminate past racial assignments, and to present to the court objective standards with respect to employment, assignment, and transfer of teachers and other personnel.

The school board filed its plan of objective standards with the court. The Negro plaintiffs and the U. S. Government filed objections, and a motion for an order requiring the school board to eliminate educational disparities between the predominantly white and the all-Negro schools and for further relief. They alleged that the school board failed to take affirmative steps to provide and implement an effective desegregation plan; that community threats and intimidation prevented Negro parents and children from exercising an uninhibited freedom of choice; that employment and assignment of teachers continued on a racial basis; that the school board continued to perpetuate inferior schools for Negro pupils, and continued a dual transportation system for white and Negro schools.

After a full evidentiary hearing held in July 1967, the court found that in the three years of the operation of the freedom-of-choice plan, reasonable progress toward elimination of the dual school system had not resulted. The fact that only 45 of about 3,100 Negro pupils elected to attend predominantly white schools during the March 1967 option, as against larger numbers in previous school years, raised an inference that the plan was not operating in a constitutionally acceptable manner, the court said. Further, the court found that community attitudes and pressures in the form of intimidation and threats effectively inhibited the exercise by Negroes of a free choice of schools and that under the circumstances prevailing, freedom of choice was an illusion.

The court also found that no adequate progress in faculty desegregation had been made, and disapproved the policy of the school authorities to assign faculty members to the school of their choice because the policy tends to perpetuate racial segregation. Another finding was the serious disparity in buildings, equipment, and accreditation as between Negro and white schools. The court concluded that the school authorities have a constitutional obligation to correct these educational disparities.

In view of its findings and conclusions, the court directed the school authorities to take the following steps: to submit a plan to the court by October 15, 1967, for the assignment at the earliest practicable date of all students upon the basis of a unitary system of nonracial geographic attendance zones drawn so as to avoid gerrymandering, or for a plan of consolidation of grades or schools, and pending court approval of the new plan, to transfer at least 10 percent of the Negro pupils to predominantly white schools for the 1967-68 school year; to provide transportation to all students who live a sufficient distance from their assigned schools to be eligible for transportation; and to provide protection that is within the authority of the school officials to persons exercising their rights under the decree.

As to the school faculties, the decree ordered the school authorities to eliminate race as a factor in hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account in the assignment or reassignment of teachers to eliminate past discrimination; to take immediate steps to accomplish substantial faculty desegregation in each school in 1967-68 even though teacher contracts for that year have already been signed and approved; to encourage faculty members to transfer or to take positions in schools where their race on the faculty is in the minority, and to assign to each school in 1967-68 at least two teachers of the minority race, white or nonwhite, if assignment on a voluntary basis does not produce significant faculty desegregation.

The decree ordered the school authorities to end racial segregation or discrimination in any service, facility, activity, or school program, and directed that prompt steps be taken to equalize facilities, equipment, courses of instruction, instructional materials, pupil-teacher ratios, and pupil-classroom ratios as between nonwhite and white schools; to close any formerly nonwhite school which could not feasibly be improved; to locate any new school or expand any existing schools with the objective of eradicating the vestiges of the dual school system and eliminating the effects of segregation. Finally, the school authorities were required to file annual reports with the court on faculty and student desegregation in each school.

Swann v. Charlotte-Mecklenburg Board of Education
369 F. (2d) 29
United States Court of Appeals, Fourth Circuit, October 24, 1966.

(See Pupil's Day in Court: Review of 1965, p. 39.)

Negro plaintiffs appealed the decision of the district court approving the school desegregation plan adopted by the school board in March 1965. The plan provided for a single geographic zoning for 99 of the 109 schools in the system. Except for the 10 schools outside the plan, all children were initially assigned to schools in 1965-66 according to their place of residence in the geographical zone, and all children, including those in the 10 excepted schools, were accorded the unqualified right of free transfer to any school in the system, subject only to space limitation in the school of choice. As a result, 2,126 Negro children were attending integrated schools in which white pupils predominated in the 1965-66 school year.

The 10 unzoned schools were Negro schools with pupils drawn from wide areas which overlapped the established zones of the other schools. The school board believed it impractical to rezone these schools, for it had construction in progress under which these 10 physically inferior schools were to be eliminated by the 1967-68 school year at the latest. By the time this appeal was heard, the operation of these schools without geographic zoning had been eliminated.

The order of the district court was affirmed on appeal. With respect to the 10 unzoned schools, the appellate court held that in view of the circumstances then prevailing, the approval of the district court of the school board's procedure was within the bounds of its discretion since there was a rational basis for not undertaking the geographic zoning of the 10 antiquated schools. And since the operation of these 10 schools had been eliminated, this portion of plaintiffs' complaint as to these schools became largely academic.

Plaintiffs had also complained about the way some of the geographic lines had been drawn, principally that the zoning of the schools had not produced a greater mixture of the races. They contended that the school lines should have been drawn with a conscious purpose of eliminating as many all-white and all-Negro schools as possible and of achieving a maximum intermixture of the races. Rejecting this contention, the appellate court held that there is no constitutional requirement that the school board act with a conscious purpose of achieving maximum mixture of the races in the school population. It ruled that the school board may consider natural geographical boundaries, accessibility to particular schools, and many other factors unrelated to race. But so long as the boundaries are not drawn in order to maintain racial segregation of pupils, the school board is under no constitutional requirement to counteract all the effects of segregated housing patterns.

Ohio

Deal v. Cincinnati Board of Education
369 F. (2d) 55
United States Court of Appeals, Sixth Circuit, December 6, 1966.
Certiorari denied, 88 S. Ct. 39, October 9, 1967.

(See Pupil's Day in Court: Review of 1965, p. 41.)

A class action was brought on behalf of Negro pupils enrolled in Cincinnati public schools to enjoin the operation of allegedly segregated schools, to enjoin the construction of new schools which would increase and harden allegedly existing segregated patterns, and for declaratory and other relief. The Cincinnati school board denied that it created, operated, or maintained racially segregated schools, alleging that the only genuine issue was whether it violated the constitutional rights of the Negro children by refusing to adopt and enforce an affirmative policy of balancing the races in the school system.

The district court held that the school board had no constitutional duty to balance the races in the public school system and that there was failure of proof by plaintiffs to establish a policy of segregation or gerrymandering by the school board. This decision was appealed.

One issue on appeal was whether there was a duty on the part of the school board to balance the races in the Cincinnati public schools where this imbalance was not caused by any act of discrimination on its part. The plaintiffs contended that the maintenance of a public school system in which there is racial imbalance is a violation of their constitutional right to equal protection of the law. They asserted that because the Negro pupil population was not spread uniformly through the school system, that even without a showing of deliberate discrimination or racial classification, school officials had a constitutional duty to eliminate the imbalance which plaintiffs claimed was harmful to Negro children and deprived them of equal educational opportunity.

In determining this issue, the appellate court pointed out that Ohio abolished segregation in the public schools in 1887, and that the neighborhood school plan for the location of public schools is authorized by statute which requires a school board to provide education to children in the district at such places that will be convenient for the attendance of the largest number; and that the Cincinnati board has complied with this statute.

The court found that because of factors in the private housing market, disparities in job opportunities, and other outside influences, the imposition of the neighborhood school concept on existing residential patterns in Cincinnati creates some schools which are predominantly or entirely of one race or another. But the court said that this situation does not, as plaintiffs contended, present the same separation and the same constitutional violation condemned in the Brown decision. For in this situation, while a child may be attending an all-Negro school, he and his parents know he has the choice of attending a mixed school and can move into the neighborhood district of such a school. If there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the Cincinnati school system, they stem from his individual economic plight or result from private prejudice and not school prejudice.

Reading the Brown decision as prohibiting only enforced segregation, the court held that there is no constitutional duty on the part of the school board to bus Negro or white children out of their neighborhoods, to transfer classes, or to select new school sites for the sole purpose of alleviating racial imbalance that the school board did not cause. The court said that a showing of a mere statistical imbalance in the Cincinnati schools is not sufficient to warrant relief to plaintiffs. Racial discrimination against pupils must be shown. Therefore, the court affirmed the district court decision that the existence of racially imbalanced schools because of the operation of the neighborhood school policy in conjunction with the residential concentration of Negroes in some areas gives no rise to relief.

The appellate court was unable to determine whether racially imbalanced schools were intentionally caused by the school board through gerrymandering and other discriminatory practices with respect to specific programs, facilities, and staff, because no findings were made on certain disputed issues. Consequently, the case was remanded to the district court for further findings on the issue of claimed discrimination in specific schools and programs and claimed harm to Negro pupils allegedly caused by racially imbalanced schools, and for the taking of additional evidence either side may offer.

The Supreme Court of the United States refused to issue a writ of certiorari for a review of this decision.

Oklahoma

Board of Education of Oklahoma City Public Schools v. Dowell
375 F. (2d) 158
United States Circuit Court of Appeals, Tenth Circuit, January 23, 1967.
Certiorari denied, May 29, 1967, 87 S.Ct. 2054.

(See Pupil's Day in Court: Review of 1965, p. 42; Review of 1963, p. 26.)

The Oklahoma City school board was enjoined from doing certain enumerated acts perpetuating racial discrimination and was ordered to submit a comprehensive plan for the complete integration of the school system. The plan submitted by the board used two criteria in the establishment of school attendance boundaries: "(1) That they represent logically consistent geographical areas that support the concept of neighborhood schools and (2) that there be as efficient as possible utilization of the building facilities available." Race would not be considered in establishing or adjusting boundaries; transfers out of the neighborhood school would be allowed only where the transfer would enable the student to take a course important to his total education and otherwise unavailable; would enable all family members to go to school together; would allow completion of highest grade in the school the student had been attending; and for other good faith, nonracially motivated reasons justifying approval. The board asserted in general terms that faculty, extracurricular activities, and all other types of student activities would be integrated.

The district court considered the plan too vague and ordered another policy statement to be filed. Upon finding the new statement too reiterative of the first plan, the court asked the board to engage an outside panel to study the district's integration problem. The board declined the request. The court, at plaintiffs' request, appointed a panel to undertake the study and after receiving the panel's report and holding a hearing thereon, the court ordered the board to prepare and submit a plan substantially identical to that set out in the panel's report. The school board appealed from this order, arguing that at the time of the filing of this suit there was no racial discrimination in the operation of the school system; that the court exceeded its authority in promulgating a desegregation plan and compelling its adoption; that the order appealed from usurped the functions of the school board in operating and managing the school system when the board has acted in accordance with the Constitution.

The appellate court held that the trial court was within its equitable powers in ordering the board to present an adequate plan for school desegregation. It was only after the board presented no new plan and refused the court's request to cause a survey of the school system that the court acted. Because of the refusal of the school board to take prompt and affirmative action after the entry of the court's order, without further action by the court, the plaintiffs were helpless to protect their constitutional rights. Under these circumstances, "it was the duty of the trial court to take appropriate action to the end that its equitable decree be made effective." In view of the facts in this record which conclusively showed that over a 10-year period, the board's action toward desegregation was only of a token nature, it was not error for the trial court to order the board to include certain specific procedures in its general desegregation plan.

The appellate court upheld as appropriate the provisions in the court plan which combined certain school boundary lines, and ordered immediate steps to be taken in faculty desegregation and in the establishment and implementation of a "majority to minority" transfer plan.

The Supreme Court of the United States denied a petition for a writ of certiorari for a review of this decision.

Pennsylvania

Pennsylvania Human Relations Commission v. Chester School District
224 A. (2d) 811
Pennsylvania Supreme Court, September 26, 1967.

During the academic year 1963-64, racial tensions were increasing in Chester, Pennsylvania. Civil rights groups were protesting the quality of education given to Negro children and the existence of de facto segregation in the public schools. The school district maintained that there was no overt discrimination and that any imbalanced schools were a result of residential patterns in the neighborhood. Trouble broke out in late March of 1964 and after a breakdown of conferences between the local parties, the Pennsylvania Human Relations Commission was instructed to conduct hearings. The civil rights groups refused to be the complainant in the dispute for fear it would jeopardize their ability to sue in court at a later date. The Commission therefore became the complaining party. It found that there had been a violation of the Human Relations Act in that there were all-Negro or substantially all-Negro schools within the district, that there were not sufficient kindergartens to accommodate Negro children, that only Negro teachers and clerks were assigned to Negro schools, that the physical condition of the Negro schools had been allowed to deteriorate, and that the school board had failed to accept or adopt any affirmative plan to desegregate the schools within a reasonable time. The Commission ordered the district to cease and desist from discriminatory practices and to take immediate corrective measures.

The school district appealed the decision, claiming that the Commission could not itself serve as the complainant or issue a final order. The lower courts agreed that the Commission could be the complainant but determined that the Commission was without jurisdiction to consider de facto segregation and that the finding that the school district had discriminated against pupils on a racial basis was not supported by substantial evidence. By the time an appeal from the Commission reached the Supreme Court of Pennsylvania, the school district had ceased its practice of assigning only Negro teachers and clerks to the Negro schools and had supplied the requested kindergartens. The only questions considered on review were the jurisdiction of the Commission to deal with de facto segregation and whether the record supported the Commission's finding that the neighborhood school system as applied in Chester violated the Human Relations Act.

The court found that the requisite jurisdiction did indeed exist. The act reads that "it shall be an unlawful discriminatory practice... for...any place of public accommodation...to... refuse, withhold from or deny to any person because of his race..., either directly or indirectly, any of the accommodations, advantages, facilities of privileges of such places of public accommodation...." The act also states that this section is to be construed liberally. The court construed the act to mean not only that there must be no affirmative discriminatory action on the part of a school district, but that a school district must take corrective measures, for a failure to act could result in denying the equal opportunity of education to all children.

In ascertaining the legislative intent, the court referred to the fact that in 1961 the Human Relations Act was amended to recognize in addition to employment discrimination that discrimination in housing does result in school segregation and is a factor along with others which threatens "the peace, health, safety and general welfare of the Commonwealth and its inhabitants." De facto segregation must have been intended by the legislature since de jure school segregation was held to be unconstitutional in 1954. The construction of this section by the lower courts ignored this legislative intent. Quality integrated education cannot stand and wait for residential patterns of housing segregation to be overcome.

The court rejected the argument of the school district that there is no authority in the Commission to require it to submit a plan. The court pointed out that the act not only instructs the Commission to enter affirmative orders to end discrimination but also to require those in violation to file a report indicating the manner of compliance.

Regarding the sufficiency of the evidence to determine that de facto segregation did exist in the Chester school system, the court found that the evidence submitted was adequate to support the orders issued. It is generally agreed that the segregation of the races in a school system results in disadvantages to the children involved. While the court would not find that the condition was deliberate, it was not entirely accidental. Of the 4,064 pupils enrolled in the five elementary schools and one junior high included in the Commission's order, only 80 students were white.

The court found that the Commission had jurisdiction and that the evidence did establish that segregation existed in the Chester school district. Therefore, the ruling of the lower court was reversed and the orders of the Human Relations Commission upheld.

South Carolina

Adams v. School District No. 5, Orangeburg County, South Carolina
271 F. Supp. 579
United States District Court, District of South Carolina, Orangeburg Division, February 28, 1967.

By a court order of August 12, 1964, the Orangeburg school board was directed to desegregate its schools in accordance with the provisions of the order.

Negro students and their parents then sought additional relief, pointing to the fact that the original court order did not require faculty desegregation and did not adequately advise the parents of their freedom of choice of schools operated by the board. After a hearing, the board was instructed to submit a new plan for desegregation embodying the provisions to alleviate the issues raised by the complaint for additional relief. The board subsequently presented a plan requiring annual exercise of choice of schools by each pupil and the hiring, promotion, and assignment of teachers best qualified to fill any vacancies occurring without regard to race.

The plan was approved by the court and was embodied in the amended order of August 12, 1964. The court retained jurisdiction of the cause for such further proceedings as might be necessary to insure compliance.

Brunson v. Board of Trustees of School District No. 1 of Clarendon County, South Carolina
271 F. Supp. 586
United States District Court, District of South Carolina, Charleston Division, February 28, 1967.

(See Pupil's Day in Court: Review of 1965, p. 45.)

In a court order dated August 19, 1965, the school board of Clarendon District No. 1 was directed to desegregate its schools in accordance with the provisions of the order.

Negro students and their parents then sought additional relief, pointing to the fact that the original court order did not provide for faculty desegregation and did not adequately advise the parents of their freedom of choice of schools operated by the board. After a hearing, the board was instructed to submit a new plan for desegregation, embodying provisions to alleviate the issues raised by the complaint for additional relief. The board subsequently presented a new plan of freedom of choice of schools by each pupil, which also required the hiring, promotion, and assignment of teachers best qualified to fill any vacancies occurring, without regard to race.

The plan was approved by the court and was embodied in the amended order of August 19, 1965. The court retained jurisdiction of the cause for such further proceedings as might be necessary to insure compliance with the order.

Tennessee

Goss v. Board of Education, City of Knoxville
270 F. Supp. 903
United States District Court, E.D. Tennessee, N.D., June 7, 1967.

(See Pupil's Day in Court: Review of 1963, p. 28; Review of 1962, p. 25 and 26; Review of 1960, p. 22.)

The issues in this school desegregation case started in 1959 centered on certain provisions in the amended plan adopted by the Knoxville school board which became effective in the 1965-66 school year.

The amended plan provided for the assignment of each pupil in the district of his residence, subject to variation owing to overcrowding and to transfer for cause to schools outside their assigned attendance zones. Negro plaintiffs objected on constitutional grounds to (a) a provision in the plan, due to expire in three years, which enabled pupils, if they wished, to continue in their present schools until completion of the grade requirements of the schools, providing this was consistent with sound administrative policy; and (b) a rule which permitted children of the same family to transfer and attend schools outside their zones of residence where a brother or sister might be otherwise required to attend different schools. A third issue plaintiffs raised was whether the school board operated the plan as modified to promote segregation.

The school authorities contended that allowing a pupil to continue in his present school until completion of the grade requirements is in the interests of his education, for it permits him to retain whatever extracurricular and outside activities he has obtained. The brother-sister rule, it was contended, should be retained because of transportation problems. Moreover, the school authorities contended that the plan as a whole has been effective in its operation in the elimination of racial discrimination and complied with constitutional requirements.

The court held that the rule which permitted a pupil on his application to attend a school outside his residence zone until he completed the grade requirement of that school was valid since the evidence showed that the rule did not promote segregation. The brother-sister rule was also upheld as valid in view of the proof that it was not carried out to promote segregation, but operated for the benefit of parents and pupils with regard to elimination of transportation inconvenience and economic hardship.

Among the numerous items raised by plaintiffs on the issue of whether the modified desegregation plan was operated to promote segregation was the contention that the school lines drawn under a neighborhood school plan were unconstitutional because they promoted segregation. The court expressed the opinion that there was no constitutional duty on the part of the school board to bus Negro and white pupils outside their neighborhoods or to transfer classes in order to alleviate racial imbalance which it did not cause; nor was there a duty to select new school sites solely to further this purpose. The drawing of attendance lines, the court said, is within the discretion of the school board and, where challenged, the board has the burden to prove that the zone lines of each school were not drawn with a view to preserve a maximum amount of segregation. The Knoxville school board has met this burden that there was no intentional gerrymandering.

Since the evidence showed that the Knoxville school desegregation plan was not being operated to deprive Negro pupils of their constitutional rights, and that Negro teachers were not being discriminated against, the various objections to the plan were denied, as was the request to enjoin construction of two proposed school buildings. In the opinion of the court the Knoxville school authorities were moving expeditiously toward full integration of the school system and, therefore, there was no further need for the schools to operate under the court's supervision. Accordingly, the case was ordered to be stricken from the docket.

Mapp v. Board of Education of City of Chattanooga, Hamilton County, Tennessee

373 F. (2d) 75
United States Court of Appeals, Sixth Circuit,
February 27, 1967.

(See Pupil's Day in Court: Review of 1963, p. 29; Review of 1962, p. 26; Review of 1961, p. 31.)

This appeal stemmed from a court-ordered desegregation plan which had been in effect for six years. The present action was filed at a time the Chattanooga, Tennessee, public school system was operating under a plan calling for gradual integration, beginning with grades 1 through 3 and culminating in complete dissolution of the dual school system by September 1968. Plaintiffs had asked that this plan be accelerated to achieve full integration by September 1965, that faculty and other professional personnel be assigned to schools without regard to race, and that all racially discriminatory practices be eliminated immediately.

The district court ruled that the plan should be accelerated to provide for full integration of all grades by September 1966. It was further held that plaintiffs were unable to prove their claim that the school board had administered its transfer regulations to defeat desegregation, and that the time was not right for a judgment of the sufficiency of the board's effort to desegregate teacher assignments. Plaintiffs appealed from this order.

On the issue of faculty assignments, the parties were agreed that under the 1965 decision of the United States Supreme Court in Bradley v. School Board of City of Richmond, a full evidentiary hearing on the issue of faculty allocation on a racial basis is necessary to any decision on the adequacy of a desegregation plan. Since under the cited case the issue of faculty allocation must be decided at the same time that the rest of the desegregation plan is formulated, the issue was remanded to the district court for consideration.

Plaintiffs' attack on the board's transfer regulations centered on a provision which in substance provided that if a pupil has started classes in one school and is subsequently rezoned to another school, he may choose to remain at his original scool, building capacity permitting. The aim of this long-standing policy was to prevent undue disruption in a child's social and educational adjustment. Under the accelerated plan put into effect in September 1966, no child could enroll in a school out of his desegregated zone, no matter at what level he entered the school. Since there was no evidence that Negro children had been discriminated against by the denial of any of their applications for transfer under the plan, and in the absence of evidence tending to show that the objective standard--disruption of pupil adjustment--was not adhered to, the lower court's findings were held not to be clearly erroneous. The court added that if, in the future, plaintiffs obtain evidence that transfers are granted without regard to legitimate placement, they might then apply for court relief as a matter of course.

Finally, plaintiffs contended that the plan was a "totally ineffective vehicle for prompt elimination of the segregated school system." The court rejected this broad-gauge attack since there was no evidence of gerrymandering in drawing new school lines or other discriminatory practices in the administration of the plan. If the board's policy resulted in larger attendance of white or Negro children in school, it was because of their residences, a factor which the board could not control.

The judgment of the district court was affirmed, except on the issue of faculty assignment, and the cause was remanded for further proceedings in accord with this opinion.

Mapp v. Board of Education of City of Chattanooga, Hamilton County, Tennessee
274 F. Supp. 455
United States District court, E. D. Tennessee, S. D., August 11, 1967.

(See case digest above.)

On remand of this case on the issue of faculty allocation on a racial basis, the court concluded that the assignment of teachers on a racial basis to maintain segregated faculties is unconstitutional without the necessity of proof by the plaintiff-pupils in their school desegregation action that faculty racial allocation has an adverse effect on the quality of education.

It is clear as a matter of constitutional law, the court said, that school boards may not assign faculty or staff on the basis of race to maintain segregated faculties or staffs, and provision for faculty and staff desegregation is an essential part of any school desegregation plan.

The court was of the opinion that the school board should be given an opportunity within 20 days of the court's order, to plead admission or denial that they follow the practice of assigning faculty and staff members of a particular race to schools dominated by that race. If the school board should deny that this practice is followed, a hearing on this issue would be held, but if the practice is admitted, the court would direct the board to submit a plan to desegregate the faculty and staff. Should plaintiffs challenge the adequacy of the plan, a hearing would be held on the issue.

Monroe v. Board of Commissioners, City of Jackson, Tennessee, and County Board of Education, Madison County
380 F. (2d) 955
United States Court of Appeals, Sixth Circuit, July 21, 1967.
Certiorari granted, 88 S. Ct. 771, January 15, 1968.

(See Pupil's Day in Court: Review of 1965, p. 46; Review of 1964, p. 56; Review of 1963, p. 22.)

This suit for desegregation of the public schools of the City of Jackson and of Madison County, Tennessee, was begun in 1963. The school boards of the city and county were ordered to desegregate their school systems. At the time of this appeal, all grades of the schools involved had been desegregated.

The present appeal results from the denial of the Negro plaintiffs' motion for further relief whereby they sought to accomplish greater integration of school children, desegregation of the teaching staffs, and to enjoin certain practices of the school authorities which were alleged to violate the original decrees of the district court and were contrary to new developments in the law.

Plaintiffs argued on appeal that the courts, by reconsidering the implications of the Brown decisions and upon their own evaluation of the commands of the Fourteenth Amendment, must now require school authorities to eradicate racial imbalance in the schools which results from residential patterns. The appellate court agreed with the conclusion of the district court that "the Fourteenth Amendment did not command compulsory integration of all the schools regardless of an honestly composed unitary neighborhood system and freedom of choice plan."

Another assertion by plaintiffs was that while giving surface obedience to the establishment of a unitary zoning system and freedom of choice, the city school officials were guilty of gerrymandering to preserve a maximum amount of segregation. The district court had found that some boundary lines appeared to have been gerrymandered and ordered changes. But the district court concluded that the junior high-school zones were not gerrymandered. The appellate court upheld this finding.

The district court had denied plaintiffs' application for an order requiring integration of the faculty, but attacked the existing school-board policy of assigning white teachers to white schools and Negro teachers to Negro schools and ordered the policy changed to the extent that teachers who so desire would not be barred from teaching in public schools in which the pupils were all or predominantly of the other race. The appellate court held that the order of the district court leaving the decision of integration of faculties to the voluntary choice of teachers was not in accord with the Supreme Court of the United States holdings on faculty desegregation. Therefore, the case was remanded to the district court for further evidentiary hearing on the matter of faculty desegregation. In addition, the district court was to give further consideration to the matter of inservice training programs for teachers. Since the inservice training programs were conducted by the school authorities pursuant to state law and were financed by state funds, the appellate court held that the pupils had standing to assert that the existence of separate teacher organizations based on race and the school authorities' cooperation with their separate activities like the inservice training programs, impairs the pupils' rights to an education free from considerations of race.

The Supreme Court of the United States agreed to hear plaintiffs' appeal from this decision.

Note: In accord with its holding in Green v. County School Board of New Kent County, Virginia, (see page 42 of this report) the Supreme Court of the United States ruled that the "free transfer" feature of the school desegregation plan in this case was unacceptable, for under the circumstances it could not be shown that the plan would further rather than delay the conversion of the dual school system into a unitary nonracial nondiscriminatory system. Therefore, the board must take steps to formulate a new plan that promises realistically to promptly convert the school system. (36 Law Week 4480, May 27, 1968.)

United States v. Haywood County Board of Education
271 F. Supp. 460
United States District Court, Western District of Tennessee, Western Division, August 4, 1967.

A suit was brought by the United States under the Civil Rights Act of 1964, against the school boards of Haywood County and Brownsville, Tennessee, seeking to abolish the freedom-of-choice initiated at the beginning of the 1965-66 school year, and to require desegregation of the faculty, supporting personnel, and school-related activities, and other steps to further desegregation of the schools. The existing plan allowed any pupil to choose to attend any school in which his grade is taught in either the city or the county system. The attorney general contended that integration is the legally required result of any desegregation plan, rather than abolition of state-imposed segregation.

On the basis of prior decisions, the court rejected the argument that the Constitution requires integration, as opposed to termination of imposed racial segregation, but said that "a freedom of choice plan is constitutional only if, in its actual operation, the Negro pupils and their parents are truly free to attend schools with whites." The evidence of intimidation of Negroes to prevent desegregation was countered to a considerable degree in the eyes of the court by defense testimony showing the incidents of violence were disapproved by the vast majority of the white citizens of the county and by the community leaders, and were not related to the school segregation issue. In the court's opinion, the situation was improving and continuing to improve, and, therefore, the court ruled that it would be improper to require abolition of the present freedom-of-choice plan.

The court held, however, that the procedure for notifying the parents and pupils of the details of the freedom of choice were defective and required improvement. The school board was ordered to require that each student exercise his choice of schools each year; to assign a number of teachers to designated schools with student bodies predominantly of the opposite race; to adopt a plan under which race would not be a factor in hiring, firing, assigning, or promoting teachers. It was further ordered that race was not to be a factor in the determination of bus routes or in other aspects of the operation of the transportation system; that all curricular and extracurricular activities be completely desegregated; that a report be filed each October revealing the racial composition of students and faculty by grade, school, and subjects taught by each teacher; and to close four inadequate elementary schools attended by Negroes at the start of the 1967-68 school year, and to close all such other schools with inadequate physical facilities by the 1970-71 school year.

Texas

Broussard v. Houston Independent School District
262 F. Supp. 266
United States District Court, Southern District, Texas, Houston Division, July 13, 1966.

Negro parents brought a class suit against the Houston School District, seeking an injunction against the district's alleged policy and practice of authorizing the construction and improvement of public school buildings with the alleged purpose of perpetuating racial segregation in the school system. The plaintiffs claimed that the school building and improvement program being contemplated in areas predominantly inhabited by Negroes have the calculated effect of perpetuating racial segregation in the schools by reinforcing the existing pattern of school locations.

The court found that the general location of schools in Houston was on a neighborhood basis; that while traditionally Negro neighborhoods retained their racial composition, there was Negro migration into once white residential neighborhoods but no parallel white migration into Negro areas. The court found further that the school district had acted in good faith in bringing about school desegregation through a judicially approved freedom-of-choice plan, that the plan was being implemented by providing and routing buses to give meaningful effect to the exercise of free choice, and that the shortcomings in the plan were in the area of communication to Negro parents. To correct the deficiency in the area of notice, the court said that registered letters should be sent forthwith to parents fully informing them of developments under the freedom-of-choice plan and of the choices available to them.

The court concluded on the basis of personal site inspection, that there was no instance in which the location of a new facility or improvement appeared calculated to discriminate racially against Negroes. Clear present need and other relevant factors, such as accessibility, safety, and physical convenience to the student, home, and community advantage of a nearby school, due regard to prevailing traffic arteries and patterns, and the general feasibility characterized the local school building project, rather than plaintiffs' suggestion of intended racial discrimination.

In denying the injunction, the court specifically held that the school district, in its proposed school building construction and improvement program was acting in good faith and without intention or purpose to maintain or perpetuate segregation.

Richard v. Christ
377 F. (2d) 460
United States Court of Appeals, Fifth Circuit, May 24, 1967.

A Negro pupil in the Hampshire-Fannett school district sought an injunction to force total and complete desegregation of the school system. The court approved a 12-year desegregation plan submitted by the school board. The pupil appealed from the order asserting that the plan did not satisfy constitutional requirements.

While the case was on appeal, the district court approved a new freedom-of-choice plan. The school board then moved for a dismissal of the appeal on grounds of mootness. This appellate court in the interim rendered a decision in United States v. Jefferson County Board of Education, 372 F. (2d) 836, (see page 16 of this report), setting forth the standards which a desegregation plan must meet to satisfy constitutional requirements.

Therefore, the district court order was vacated, and the case was remanded for further proceedings consistent with the Jefferson County decision.

Virginia

Betts v. County School Board of Halifax County, Virginia
269 F. Supp. 593
United States District Court, Western District of Virginia, Danville Division, May 9, 1967.

Negro students enrolled in the Halifax County school system sought an injunction requiring the school board to develop and implement a plan to desegregate students, faculty, and supporting staff throughout the school system, and to enjoin the construction of new schools in such manner as to perpetuate racial segregation.

The board filed a motion to dismiss the action on the ground that prior to its being instituted, the board had adopted and instituted a plan which met both constitutional requirements and the standards of the Department of Health, Education, and Welfare. The court denied the motion on the theory that Bradley v. School Board of City of Richmond, 345 F. (2d) 310 (1965), required that the Negro students at least be given an evidentiary hearing. Two hearings were subsequently held, and the board then moved for summary judgment. The evidence disclosed that in the spring of 1965 the board had adopted a freedom-of-choice plan, which, as amended a year later, allowed all pupils to choose their schools; provided for teaching and administrative assignments be made on the basis of qualifications; and required that other than an effort to place Negroes and white teachers in schools formerly attended by the opposite race, vacancies must be filled without regard to race.

While rejecting the plaintiffs' contention that the school board has a duty to act affirmatively to bring about integration, the court, however, emphasized that "they must act fairly in opposition to discrimination."

With regard to pupil assignment under the freedom-of-choice plan, the court determined that "the plan must afford an annual mandatory choice" of schools by the parents and that this provision be publicized. The court found other aspects of the plan as it related to pupil assignment and transportation, activities, and programs to be constitutionally sufficient.

Although the faculty and staff desegregation provisions were found to be generally adequate, the court scored the absence from the plan of a statement of the goal to be attained. Therefore, the court ordered the board to modify its plan to include as its goal "that the pattern of assignment of teachers and other professional staff among the various schools in its system may not be such that schools are identifiable as intended for students of a particular race, color or national origin" and a pledge that the school system will work to achieve this goal toward the end that the percentage of Negro teachers in each school approximates the percentage of Negro teachers in the entire system.

Finally, the court held that the evidence did not indicate that the school board had planned school construction so as to perpetuate segregation, but recommended that the school board incorporate a pledge in its desegregation plan that the program for construction of new schools or additions to existing schools will not be designed to perpetuate, maintain, or support racial segregation.

Because of the substantial progress in implementing the plan as shown on the record, the court granted the school board's motion for summary judgment upon condition that the board present evidence within 60 days that its plan has been amended in accordance with the court's order. Upon the due compliance of the board by adding to its plan the three provisions recommended by the court, the suit would be dismissed.

Bowman v. County School Board of Charles City County, Virginia

382 F. (2d) 326
United States Court of Appeals, Fourth Circuit,
June 12, 1967.

In this appeal, Negro plaintiffs attacked the freedom-of-choice school desegregation plan adopted by the school authorities. They contended that the plan deprived them of their constitutional rights and that compulsive assignments of pupils should be required to achieve greater intermixture of the races, notwithstanding their individual choices.

Since the Negro plaintiffs conceded that their annual choice of school was unrestricted and unencumbered under the freedom of choice plan in operation in the school system, the appellate court held that on this aspect of the plan there was no denial of any constitutional right not to be subjected to racial discrimination.

Negro plaintiffs also complained on appeal that provisions in the plan with respect to faculty desegregation were insufficient because of the absence of an immediate requirement of substantial interracial assignment of all teachers. The appellate court stated that the elimination of discrimination in the employment and assignment of teachers and administrative employees could no longer be deferred, but involuntary reassignment of teachers to achieve racial blending of faculties in each school was not a present requirement, in the absence of current information in the record before the court.

The court was of the opinion that, in the light of plaintiffs' complaints with respect to faculty desegregation, any subsequent order of the district court should incorporate some minimal, objective time table. As to the minimum standards to be required, the district court was referred to the decision of the Fifth Circuit Court of Appeals in United States v. Jefferson County Board of Education (see page 16 of this report) requiring school boards to take affirmative steps to accomplish substantial desegregation of faculties in as many schools as possible for the 1967-68 school year, and wherever possible, to assign more than one teacher of the minority race to each desegregated faculty.

Green v. County School Board of New Kent County, Virginia

382 F. (2d) 338
United States Court of Appeals, Fourth Circuit,
June 12, 1967.
Certiorari granted, 88 S. Ct. 565, December 11, 1967.

The questions presented in this appeal concerned the inadequacy of the freedom of choice plan as an effective method of pupil desegregation and the insufficiency of the provisions in the plan for faculty desegregation because of the absence of an immediate requirement for substantial interracial assignment of teachers.

These questions were substantially the same as in Bowman v. County School Board of Charles County (see case digest above) decided by this court on the same day. Consequently, the rulings of the district court in the instant case were given substantial approval by the appellate court but with remand of the case for further proceedings in accordance with its opinion in Bowman.

The Supreme Court of the United States granted the Negro plaintiffs' petition for a writ of certiorari for a review of this decision.

Note: On May 27, 1968, the Supreme Court vacated the judgment of the appellate court insofar as it affirmed the district court and remanded the case for further proceedings. The Court held that the "freedom of choice" plan was unacceptable in the circumstances of this case (where there is no residential segregation) as a sufficient step for dismantling the dual school system because in the three years of its operation no single white child attended a Negro school and 85 percent of the Negro children still attend the all-Negro school. The Court said that the school board had the burden to come forward with a plan that promises realistically to work now. The Court made it clear that it was not holding that a freedom-of-choice plan might of itself be unconstitutional, but rather that all it was deciding was that in desegregating a dual school system, a plan utilizing "freedom of choice" is not an end in itself. Since in this case the plan did not further the dismantling of the dual school system but operated simply to burden children and their parents with the responsibility which the Brown decision squarely placed on the school board, the Court held that the board must be required to formulate a new plan, and in the light of other options open to it, such as zoning, fashion steps "which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." (36 Law Week 4476, May 27, 1968.)

LIABILITY FOR PUPIL INJURY

California

Cabell v. State of California
55 Cal. Rptr. 594
Court of Appeal of California, First District, Division 2, December 22, 1966.
Hearing granted, California Supreme Court, February 15, 1967.

A student at San Francisco State College, who was a paying resident in a dormitory building owned and operated by the state, sued the state to recover damages for personal injuries. He was injured when he attempted to push open a swinging glass door leading to a lavatory in the building and his hand slipped from the side wood paneling and went through the glass.

The complaint alleged that the glass was not of the safety variety, and that the dormitory building was negligently designed, constructed, operated, and maintained. The state moved for summary judgment. In opposition, the student filed affidavit which disclosed two prior accidents of a similar nature to his in the building, and the replacement of the broken glass with a wooden window panel after his accident.

The state's motion for summary judgment was granted on the basis of the affirmative defense in a provision of the 1963 Public Liability Act which provides immunity from liability of a public entity "for injury caused by the plan or design of a construction of, or an improvement to, public property" where the plan or design was approved in advance by a public agency or employee exercising discretionary authority, and there was a reasonable basis for such approval.

The appellate court reversed the judgment, holding that this provision is no defense to a case of negligent maintenance of a condition which accords with the original plan or design, but which in its subsequent use is clearly shown to be dangerous, as in the instant case. Since the student's complaint alleged that the doors were negligently maintained, and his affidavits disclosed two previous incidents similar to his, one of which resulted in facial injuries, he is entitled to have the jury decide whether the prior accidents afforded notice to the state of a hazardous condition, and whether under the other statutory requirements, the action or inaction of the state to protect against the risk of injury was reasonable. This conclusion, the court said, accords with the legislative intent with the 1963 statute to abrogate prior rules concerning governmental immunity.

Hom v. Chico Unified School District
61 Cal. Rptr. 920
Court of Appeal of California, Third District, September 14, 1967; rehearing denied, October 13, 1967.

A pupil filed a damage complaint against the school district, alleging personal injuries suffered while participating in high-school physical education activities. The school district demurred, pointing out that the complaint failed to show compliance with statutory provisions requiring timely filing of a claim with it before the suit could be brought. The court sustained the demurrer without leave to the pupil to amend the complaint. The pupil appealed on the ground that the claim filing statutes were unconstitutional as to minors.

Under the statutory provisions, injury claims against public entities must be filed within 100 days of the accident before bringing suit. Minors who failed to act within this 100-day period could, on the basis of minority, apply to the public entity for leave to file a late claim within one year, and the application must be granted. Stricter provisions applied to adults seeking to file late claims. In this case, application for leave to present a late claim was made 15 months after the school accident occurred. The school district denied the application, after which this lawsuit was brought.

The appellate court affirmed the judgment against the pupil, holding that in view of the one-year period in the statute for filing the injury claim and the failure of the pupil to comply, the school board and the court were powerless to grant relief.

Jackson v. Board of Education of the City of Los Angeles
58 Cal. Rptr. 763
Court of Appeal of California, Second District, Division 3, May 10, 1967; rehearing denied, May 31, 1967.

An action for wrongful death was brought against the school board and several individuals by the mother of a pupil who drowned while surfing with fellow pupils during a high-school class outing. The complaint alleged the death was caused by defendants' negligent supervision of the pupils. A claim for damages had been timely filed with the city clerk of the city of Los Angeles, who denied the claim. No claim was ever filed with the school board.

The statutory provisions then in effect required that before a suit for damages could be brought against a "public entity" defined to include a city, county, or any district, local authority, or other political subdivision of the state, a claim must have been filed within a specified time with the clerk, secretary, or auditor of the local public entity or its governing body to be sued. These provisions were applicable to school districts.

The question before the court was whether presentation of the claim to Los Angeles satisfied the requirement of presentation of the claim to the Los Angeles board of education. The mother unsuccessfully argued on appeal that she had substantially complied with the statutory requirements when she addressed her claim to the city.

The court held that filing of the notice of claim with the city did not satisfy the statutory requirements of presentation of a claim to the school board. The court pointed out that by statute, the school district, not the city, was liable for any judgment arising out of the event leading to the claim, which would be payable out of school funds, and that the city and the school district are separate entities. Hence, presentment of the claim to the city was not equivalent to a presentment to the school board.

Summary judgment in favor of the school board was affirmed.

Florida

Bonvento v. Board of Public Instruction of Palm Beach County
194 So. (2d) 605
Supreme Court of Florida, January 25, 1967.

By special legislation, $50,000 was appropriated out of the funds of the Palm Beach county board of public instruction to be paid to a pupil injured in class. A section of the state constitution proscribed the enactment of any law authorizing the diversion of any county or school district funds for "any other than school purposes." A lower court held that the expenditure in question was not a "school purpose" and, therefore, the special legislation authorizing it was invalid. This interpretation was reversed on appeal.

The pupil in this case suffered serious back injury when a "human pyramid" of which he was a part and which was formed under a teacher's supervision in a physical education class collapsed. The pupil fractured his spine and his lower extremities were paralyzed. The injuries affected 65 to 75 percent of his body. The state legislature acted to compensate him for medical expenses.

The Florida Supreme Court held the appropriation of public funds to compensate an injured pupil was valid. The court noted that acts of the legislature carried such a strong presumption of validity that they should be held constitutional if there was any reasonable theory to that end. Moreover, any unconstitutionality had to appear beyond all reasonable doubt before a legislative act was condemned.

In argument on the pupil's behalf, a question posed was whether or not there could be any doubt that had a piece of school furniture been broken as a result of the collapse of the human pyramid, the repair could have been made from school funds. The court answered this question affirmatively, and asked "if school funds may be used to repair any broken piece of furniture or equipment, why not a broken human body?"

The court cited statutory provisions for insuring school athletes and requiring county boards to procure insurance to cover liability for personal injury or death to pupils while being transported to and from school or a school activity. While these statutes were not directly involved, they did reflect to the court an attitude that pupils be safeguarded. The court held that the special act had not been proven invalid beyond a resonable doubt and that it should not be declared unconstitutional.

Georgia

Board of Education of the City of Waycross v. Bates
151 S.E. (2d) 524
Court of Appeals of Georgia, Division No. 1, September 9, 1966; rehearing denied, September 26, 1966.

A parent sued the school board to recover damages on an alleged contract for medical services and expenses he incurred because of knee injuries his son sustained in an interscholastic football competition conducted as part of the school athletic program. His petition alleged that the team doctor employed by the school board, in concurrence with the parents and the boy, arranged for treatment of the injury by a specialist who performed an operation; that the services were contracted by the school board through the team doctor, although the parents were billed and paid the expenses extending over almost a two-year period; that prior to the injury, the school board had represented to parents and students that insurance had been procured to cover all medical expenses for injuries sustained in football activities under school supervision; that throughout the medical supervision by the team doctor, it was understood that the policy covered expenses, and that only after the expenses were incurred was it learned that the policy covered only expenses incurred within one year of the date of the accident.

The lower court overruled the motion of the school board to dismiss the petition.

The judgment was reversed on appeal, on the ground that the petition failed to state a cause of action against the school system. The court held that the school system had no authority to indemnify the parent out of public tax funds for the injuries his son sustained in the school football program. The school board's representation that it had an accident policy to cover "all" medical expenses, was merely an expression of a legal opinion the board had no authority to make, and on which the parent had no right to rely, and which was without sufficient consideration to constitute a contract to pay for the medical expenses excluded by the policy. Since the parent alleged that he knew of the policy and that the policy was a means for indemnification, the court said, it was incumbent upon the parent to ascertain for himself the actual provisions and limitations of the policy so that he might take whatever appropriate action was indicated thereby as necessary or advisable.

Illinois

Kaske v. Board of Education for the School District of the Town of Cherry Valley, No. 112, Winnebago County
222 N.E. (2d) 921
Appellate Court of Illinois, Second District, Aurora, December 13, 1966; rehearing denied, February 7, 1967.

A student who was injured as a result of a fire during an experiment in a general science class brought an action against the school board and the teacher. The jury returned a verdict of not guilty, and the student appealed.

The appellate court affirmed the judgment, holding that the alleged negligence of the teacher with respect to the explosion and the resulting injury to the student who was standing by the table and was set afire, was for the jury to decide.

(Note: Only abstract published.)

Kentucky

Wood v. Board of Education of Danville
412 S.W. (2d) 877
Court of Appeals of Kentucky, March 17, 1967.

Parents, seeking to recover damages for personal injury to their son, sued the state, the Danville board of education, the board members as individuals, and two persons, Caddas and Clem. It was alleged that the boy suffered injuries while under the supervision of Caddas, and these injuries were the result of the negligence or willful conduct of Caddas as an "agent, servant and employee" of the school board, or by the willful conduct of Clem on his own behalf or as an agent of Caddas.

The court held that the action was properly dismissed as to the board of education on the ground that the board was entitled to the defense of sovereign immunity. The parents also sought to hold liable the individual board members on the theory that they employed Caddas and that he was their agent. The court rejected this theory too, noting that a board of education is a body politic and that Caddas was employed by the board and was not an employee of individuals comprising the board. Nor was there a proper basis for liability as to board members individually on the theory that by statute the parents were compelled to place their child in attendance at the school and thus "in the care, control, and custody" of board members and their "agents, servants, and employees."

Also rejected was the allegation that there was an implied promise by the individual board members by reason of compulsory attendance of the child at school to "safely keep and protect said infant child and permit him to return to the home of the plaintiffs in good health, sound of body and mind, and without injury." To accept this allegation, the court said, would make the individual members of the school board insurers of the welfare of all children required to attend school.

Louisiana

Frank v. Orleans Parish School Board
195 So. (2d) 451
Court of Appeals of Louisiana, Fourth Circuit, February 13, 1967.

The mother of a junior high-school pupil sued the school board and a physical education teacher to recover damages for a fractured arm incurred by her son as a result of an alleged assault by the teacher. This accusation was denied, and it was asserted that the boy attempted to commit an unprovoked attack on the teacher.

The record showed that while the teacher was instructing the pupils in a basketball drill, he twice ordered the boy off the basketball court and onto the sidelines because of his nonconformity with instructions. Testimony on how the injury occurred was not reconcilable. According to the teacher, the boy returned to the basketball court without permission a third time, and was escorted off it again by the teacher; once on the sidelines, the boy attempted to strike the teacher, and when the teacher grasped him by the arm to restrain the boy, he resisted and in doing so fell to the floor and broke his arm. The boy insisted that the teacher, without provocation other than the boy's unauthorized presence on the court, menaced and chased him around the court, and on catching him, lifted and shook him against some folded bleachers and then let him go so suddenly that the boy fell to the floor fracturing his arm.

Judgment was rendered against the school board and the teacher. Both parties appealed.

On review of the record, the appellate court found that the evidence preponderated in favor of the pupil. The court was unconvinced that the teacher, who was 5 feet, 8 inches tall, and weighed 230 pounds, in good faith actually believed that his physical safety was endangered by a blow from the pupil about a foot shorter and weighing 101 pounds. The court upheld the conclusion of the trial court that the teacher's actions in lifting the pupil, shaking him in anger and dropping him, was clearly in excess of the physical force necessary either to protect himself or to discipline the pupil. The lack of judgment on the part of the teacher in injuring the pupil in the course of ostensibly disciplining him, subjected the teacher and the school board to liability for the injuries incurred.

The court refrained from making any judicial pronouncements as to whether it is actionable per se for a teacher to place hands on a pupil. The individual facts and environment of each case would disclose both the right and the reason for a teacher to use force and the degree of force, if any, which may be used.

Minnesota

Mikes v. Baumgartner
152 N.W. (2d) 732
Supreme Court of Minnesota, August 18, 1967.

A 14-year-old pupil was struck by an oncoming car after she alighted from a school bus. The car was traveling at a high rate of speed and veered across the road. Its driver had seen the school bus and its flashing lights, but lost control of and could not stop the car. The school bus driver, in violation of known regulations of the state board of education, opened the door and discharged the pupil before all traffic from the front and rear came to a full stop, and failed to deliver her across the highway.

An action for damages was brought against the driver and the owner of the car, the private owner of the school bus, and the bus driver. A jury verdict was returned against all of the defendants and the court granted a motion for a new trial on the issue of damages on the ground that the amount awarded by the jury was excessive. The owner of the school bus and the driver appealed, claiming that the bus driver was guilty of no negligence, but even if he were, the extreme negligence of the car driver was a superseding and intervening cause insulating the negligence of the bus driver.

The statutes relating to school bus transportation provide that the driver of a school bus or a school bus patrol may supervise children who must cross a highway before boarding or being discharged from a school bus; and that the state board of education shall adopt regulations for the operation of school buses. The bus driver argued that the state board regulations were inconsistent with the statutes in that the regulations provide that the bus driver shall supervise the crossing of school children.

The court ruled that the state board of education had statutory authority to adopt regulations requiring a school bus driver to supervise the safe crossing of children over a highway, that such regulations have the force and effect of law, and the violation thereof as charged by the trial court, constitutes prima facie evidence of negligence.

The court held further that the duty of the driver was not discharged after he permitted the children to leave the bus, but that he was under a further and continuing duty to guide them safely across the highway to protect them. Therefore, where in violation of regulations a bus driver discharged children and placed them in a position of danger, the negligence of a driver of an approaching vehicle which runs into and injures a child, does not constitute a supervening and intervening cause, relieving the bus driver of liability for the child's injuries.

Other issues raised on appeal were found not to be reversible errors. Judgment was affirmed.

Vogt v. Johnson
153 N.W. (2d) 247
Supreme Court of Minnesota, September 22, 1967.

A school bus company and the bus driver were sued to recover damages for the wrongful death of a seven-year-old boy who was struck and killed by a motorist, also a defendant.

The child, along with others, was waiting at the regular bus stop to be picked up. Sometimes, particularly in inclement weather, the driver would vary his practice and pick children up on the opposite side before turning around. There was evidence that on the day of the accident, the child had observed the bus pick up children who had crossed the highway at points before it approached the intersection at the opposite side of the bus stop. The bus had slowed down as it approached the intersection. Before it got there, the child left his companions at the curb, darted into the highway and was hit by the car coming from the opposite direction.

The jury returned a verdict against all the defendants. The trial court granted a motion for judgment notwithstanding the verdict in favor of the owner and the driver of the school bus. This decision was upheld on appeal.

The court held that the evidence supported the decision of the trial court that there was no actionable negligence on the part of the school bus driver since at the time of the accident his responsibility or duty to care for and protect the child had not arisen, and there was no precaution he could have taken to avoid the accident.

New Jersey

Jackson v. Hankinson
229 A. (2d) 267
Superior Court of New Jersey, Appellate Division, April 24, 1967.

Parents brought an action against a contract bus driver and the school board to recover for loss of sight of an eye by a pupil when he was struck by a rubber band-propelled projectile shot by a fellow pupil while on a school bus.

There was evidence that the board expected the bus driver to maintain order on the bus and that two students were appointed by the school authorities to assist as "safety patrolmen." Only one of the patrolmen was on board at the time of the incident, and she testified that the driver stopped the bus to warn the students on one occasion and that both she and the driver had collected rubber bands from unruly students during the trip. It was further revealed that the rubber bands and paper clips had been acquired from the teachers' desks.

At the close of the parents' evidence at the trial, the school board moved to dismiss the case on basis of governmental immunity, and that liability could not attach unless the evidence would reasonably permit a jury finding of "active wrongdoing." The trial court relieved the school board of any liability on the ground of governmental immunity, and the bus driver won a verdict from the jury.

On appeal, the parents argued that the trial court erred in instructing the jury that the driver was under a duty to exercise reasonable care, such as a reasonably prudent person would use under the existing and proven circumstances. Their contention was that the driver owed a "high degree of care," such as is owed by a common carrier and that this standard should be applicable to all who transport people for a charge whether or not a common carrier.

In upholding the trial court as to the standard of care owed by the driver, the court found the instruction to be fair and adequate, particularly since the trial court pointed out that the "amount of care" called for under the standard of reasonable care may increase in proportion to special hazards presented.

The court then considered the parents' contention that the trial court erred in introducing the issue of governmental immunity into the trial at the end of the presentation of their case. They stressed that until then the school board in no way projected governmental immunity as a defense. The court held that in the absence of prejudice, a defense will be considered properly before the court although not pleaded "where public policy calls for it." The parents failed to show any prejudice by the belated introduction of the issue, nor did they request time to prepare an answer or move for a mistrial.

Finally, the court reached the question of whether the function of transportation of children to school under school-board auspices is a proprietary function, making the school board liable for the injury; or whether it is a governmental function to which no liability would attach. The facts revealed that the board and its personnel retained supervision with respect to the safety of the children by assigning student "safety patrolmen" to the buses, and by boarding the buses to speak to the children in a disciplinary manner. Therefore, the court concluded, "the activity is in the area of public education" and subject to the doctrine of governmental immunity.

However, the court held that the evidence might have permitted a jury finding of active wrongdoing by the school board, thus removing governmental immunity. The court said that the jury could have found that the board knew or should have known of the propensity of this immature age group to propel objects endangering eyesight, and the jury "could have found that failure to exercise precautions to prevent such children from acquiring rubber bands and paper clips from the teachers' desks before boarding a bus where they would not be subject to direct surveillance of a teacher was fraught with hazard." the board could further be found negligent in not appointing a substitute safety patrolman in the event of the absence of a regular patrolman or in inadequately implementing by reasonably effective methods of supervision of the board's representatives who had assumed responsibility for the safety of pupils on buses.

The judgment was reversed and the case was remanded for a new trial only as to the school board.

Titus v. Lindberg
228 A. (2d) 65
Supreme Court of New Jersey, March 20, 1967.

A nine-year-old child sued the parents of another child, the principal, and the board of education for injuries suffered when struck by a paper clip shot from an elastic band by another child before the classrooms opened. The pupil-plaintiff was struck while riding his bicycle onto the school grounds en route to the bicycle parking rack. The evidence revealed that the school was a "pickup site" for three other schools with older pupils and that the boy who shot the paper clip was a 13-year-old pupil waiting for the transfer bus.

Although the first bell rang at 8:15 A.M. and the last bell rang at 8:30 A.M., the principal was aware that pupils began arriving at 8:00 to 8:30 A.M. The principal's supervision of the pupils extended to the point of milk delivery, and thence, a walking tour through or around the building to the transfer area.

The complaint charged that the paper clip was negligently shot; that the principal negligently failed to exercise supervision; and that the board of education had "actively and affirmatively failed to provide the necessary safeguards."

The trial court rendered judgment for the injured pupil after a jury trial, and the board and the principal appealed.

On appeal, the judgment was affirmed. The principal contended that he was entitled to have the case dismissed on the ground that there was insufficient evidence to enable the jury to find negligence on his part. The court disagreed, noting that the record disclosed the contrary: that the principal had announced no rules with respect to the congregation of the students and their conduct before entering the classrooms; that he had assigned no teachers or other personnel to assist him in supervising the pupils; and that he failed to take any measures in overseeing their presence and activities except at the point of the milk delivery and walking around or through the building.

The court held that the principal and the board should reasonably have anticipated the conduct which resulted in the injuries and to have guarded against it. In allocating the liability for damages to each defendant, the court declared that the board on behalf of itself and its agent, the school principal, should be liable for only one-half of the damages rather than each defendant being separately liable for one third of the award.

New York

Cioffi v. Board of Education of City of New York
278 N.Y.S. (2d) 249
Supreme Court of New York, Appellate Division, First Department, March 21, 1967.

An 11-year-old pupil was injured when he became the target for iceballs thrown by 20 or 30 boys in the schoolyard. His parents brought suit for damages against the New York City school board. The jury found that the schoolyard was inadequately supervised. At the time of the incident, no teacher was present to supervise the playground activities.

On appeal, the court affirmed the decision, holding that the school authorities knew or should have known of the hard frozen snow or ice upon the schoolyard ground, and that the evidence of inadequate supervision was sufficient for a jury to make its finding.

The dissenting justice expressed the opinion that no breach of duty to the pupil was established. Citing prior case law, the dissent declared "the extent of liability for the consequences of snowball throwing is stated to be to supervise (but not prevent) it during recreational periods. At other times it is to take 'energetic steps to intervene...if dangerous play comes to its notice while children are within its area of responsibility.'" There was no notice in this instance that ice would be thrown, or that the boys in the school yard would make the pupil in this case their target.

Withey v. Board of Education of the Homer Central School District
280 N.Y.S. (2d) 925
Supreme Court of New York, Appellate Division, Third Department, June 28, 1967.

The lower court granted a father's petition to file a late notice of his derivative claim against the school board for injuries to his child, and the school board appealed. A statute provides that permission to file a late notice of claim may be granted where the claimant fails to serve notice of claim within the time allowed by statute by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier.

The appellate court reversed the trial court, and denied permission to the father to serve late notice of claim. Although the father's affidavit set forth oral statements by the board's agents, the only writing referred to was a statement signed by the father at the request of the board's insurance carrier. This statement, the court held, was not made by or in behalf of the board or its agent, but rather by the claimant, and, therefore, was not an adequate basis for permission to file late notice of claim.

Pennsylvania

Esposito v. Emery
266 F. Supp. 219
United States District Court, E. D., Pennsylvania, April 6, 1967.

(See Pupil's Day in Court: Review of 1966, p. 39.)

A seven-year-old boy was injured when a bank of four lockers fell on him as he attempted to open one of them. This suit charged the principal and the head custodian of the school with negligence for failure to inspect the lockers and to correct the alleged defective condition which a reasonable inspection would have disclosed, and, alternatively, with the failure to correct or to warn of an obvious danger. The defendants denied any duty to inspect the lockers and denied that a condition of obvious danger existed. Evidence revealed that while some lockers of the type involved were fastened to either the wall or the floor, they were designed and manufactured as free-standing lockers.

In deciding for the defendants on both points, the court held that the evidence revealed the supervising principal and the supervisor of maintenance of the school district to be responsible for the maintenance and safety of school property and not the defendants, principal and head custodian of the school, since the supervising principal "did not delegate the inspection function to the school principal or custodian, nor...seek advice or information from them." The court further observed that since the lockers were designed to be free-standing, the evidence did not support a finding that an obvious condition of danger existed.

Husser v. School District of Pittsburgh
228 A. (2d) 910
Supreme Court of Pennsylvania, May 2, 1967.

A high-school student while leaving the school through the boys' exit, was accosted, assaulted, and seriously beaten by a gang of rowdies when he refused their demands for money. The school district was sued for damages.

The trial court dismissed the suit, and this appeal was taken.

The student argued that the doctrine of governmental immunity which protects a school district from liability while engaged in its governmental functions should be abolished. Citing case law, the court upheld the doctrine of governmental immunity without discussion.

The court also rejected without discussion the alternative contention that since criminal incidents had occurred with great frequency at the school, and since the school district and its supervisory personnel were aware of the potential recurrence of these incidents and the consequent danger to the students, the inaction of the school district was "tantamount to the maintenance of a nuisance of the school property" and not protected by the immunity rule. The court stated, "The acts complained of may constitute negligence on the part of the school district, but do not constitute nuisance in law."

Washington

Chappel v. Franklin Pierce School District, No. 402
426 P. (2d) 471
Supreme Court of Washington, Department 2, April 6, 1967.

This action was brought against the school district by a student who was injured while going through the initiation exercises of the Franklin Pierce High School Key Club, an auxiliary of Kiwanis International honoring student scholastic and leadership abilities. With the knowledge of the faculty advisor, the club planned the initiation to be held at the home of a student-member and planned the exercise to include some physical activity on the part of the initiates. One of the physical exercises required that the initiate be blindfolded, disoriented, and after being made to believe that he was standing on the edge of a pool, told to jump in. In actuality the student was only a few inches above the solid ground. The site of the jump was changed for the student who was injured to an area which sloped steeply down for about three feet. He landed on the sloping ground near the base, and as a result, sustained a fractured ankle. Though the faculty advisor was not present, he had called the owner of the premises who consented to supervise the boys. The teacher testified that had he been there, he would not have permitted a jump on uneven ground.

At the time of the incident, the school had an unwritten regulation that initiation activities be of the "nonhazing" variety, and that all initiation ceremonies be conducted on the school grounds. While it was not certain that the faculty advisor had been aware of this regulation, it was certain that initiation exercises involving physical activity were conducted away from the campus with the knowledge and supervision of the faculty advisor and without objection from the school administration or school district authorities.

The trial court granted the school district's motion to dismiss the suit against it for injuries the student sustained on the basis that the initiation ceremony possessed no educational or cultural value and was, therefore, ultra vires.

On appeal, the student argued that the defense of ultra vires was abrogated by the state's Tort Claims Act. In rejecting this contention, the court cited case law, holding that the statutory phrase limiting liability to acts committed "within the scope of its authority" was not repealed by the Tort Claims Act by implication.

However, the court agreed with the student's contention that the defense of ultra vires was not applicable to the circumstances in the case. The court held that where, as in this case, the evidence revealed that educational and cultural values inhere in the normal activities of an extracurricular student body organization, over which the school administration has assumed supervisory responsibility which extends to tacit approval of and faculty participation in planning and supervising off-campus initiation activities involving physical ordeal, "the school district cannot relieve itself of potential tort liability arising out of an initiation stunt upon the grounds that, standing alone, the initiation rite possesses no educational or cultural values."

Judgment of dismissal was reversed and the case was remanded for a new trial.

Swartley v. Seattle School District No. 1
421 P. (2d) 1009
Supreme Court of Washington, Department 1,
December 22, 1966.

A parent brought an action against the school district for wrongful death of his son. Judgment was rendered against the school district and this appeal followed.

The boy, a seventh-grader, was working on a project in a manual training class. Adjacent to the classroom was a wood storage room where materials for student projects were kept, and where sheets of heavy plywood were stacked vertically leaning against a wall. The students had been instructed about a rule that they were not to enter the storage room alone or without permission of the teacher. This rule, the school district contended, was a safety rule, but the parent asserted that the rule was to prevent improper depletion of the wood supply. Ordinarily, the doors to the storage room were locked, but the teacher had unlocked them the morning of the accident. On that day, the boy informed the teacher about his project and gave him a dollar for materials but did not ask for lumber. The boy entered the storeroom without express permission or notice to anyone. Later he was found pinned beneath sheets of plywood and the storage racks. One board was pressed down on his throat, strangling him. There was testimony by the over-all supervisor of industrial arts that the method of storage of the plywood at the school was unsafe.

In its appeal, the school district claimed that the trial court erred in a number of respects, but all the assignments of error were held to be without merit.

In the light of the facts and circumstances, the court held that whether the plywood was stored in a safe manner and whether the boy was guilty of contributory negligence became questions of fact for the jury. Since there was substantial evidence or reasonable inference from the evidence to support the verdict of the jury against the school district, the court ruled that the verdict must be sustained.

Wisconsin

Bruss v. Milwaukee Sporting Goods Company
White v. Milwaukee Sporting Goods Company
150 N.W. (2d) 337
Supreme Court of Wisconsin, May 9, 1967.

Two high-school pupils responded to the request of the gymnasium teacher by volunteering to help the school custodians fold school bleachers in the gymnasium with which they were having difficulties. In the process, the bleachers collapsed and injured the pupils. About a month prior to the accident, the salesman and installer of the company which sold the bleachers to the school district had inspected them and observed certain defects which he reported to the sales company, the manufacturer, and the school district. The defects had not been repaired by the time the accident happened.

The pupils originally commenced an action for damages against the sales company, the manufacturer, and the school district. The latter two settled with the pupils, who then filed an amended complaint only against the sales company. After trial, the jury returned a verdict that the bleachers collapsed as a result of a defect found by the salesman, that the sales company as well as the manufacturer were causally negligent in failing to repair the defect and in failing to give adequate notice of the defect to the school authorities; and that the school district was causally negligent in permitting the pupils to participate in moving the bleachers. Under the comparative negligent rule, the jury attributed 35 percent of the negligence to the sales company, 55 percent to the manufacturer, and 10 percent to the school district.

On appeal, the court affirmed the judgment and held that there was sufficient credible evidence in the record to sustain the jury finding of negligence on the part of the sales company, and that its negligence was a substantial factor in producing the injury.

Cirillo v. City of Milwaukee
150 N.W. (2d) 460
Supreme Court of Wisconsin, May 9, 1967.

A 14-year-old pupil was injured in a rough "keep away" game in the school gymnasium when he was pushed into another pupil and fell on the floor. The roughhouse game was played while the teacher was out of the room for 25 minutes. He had left a group of about 50 adolescent boys unsupervised during that time.

The pupil brought an action to recover damages against the teacher and the city. His mother also sued to recover derivative damages. It was claimed that the defendants were negligent in failing to provide rules to guide the class, in attempting to teach an excessive number of pupils, and in the teacher absenting himself and exposing the pupil-plaintiff to an unreasonable risk of harm by leaving the class of almost 50 unsupervised. The defendants denied negligence, and alleged contributory negligence on the part of the pupil in knowingly participating in a dangerous game and in failing to follow the teacher's instructions not to engage in horseplay.

The trial court granted the defendants summary judgment. The issues on appeal were whether the trial court was correct in these respects: (a) in finding as a matter of law that the teacher breached no duty to the pupil; (b) in holding, even if there was a jury question of the teacher's negligence (which did not get to the jury) that the pupil's negligence as a matter of law was at least 50 percent of the negligence involved; (c) in concluding that as a matter of law, liability should not be imposed on defendants under the circumstances of the case, for this would impose an undue burden on the school system and taxpayers, making them absolute insurers of students' safety.

The court held that the trial court erred on all three issues, and that summary judgment should not have been rendered in this case. As to negligence, the court stated the rule to be that the harm must reasonably be foreseen as probable by a person of ordinary prudence under the circumstances, if conduct resulting in such harm is to constitute negligence, but it is not necessary that the actual harm that resulted from the conduct be foreseen. In this instance, if the teacher could have foreseen the harm to some students in the class arising from rowdyism as a result of his absence, it is immaterial that the harm actually resulting was not that foreseen by the teacher. Nor as a matter of law, was the rowdyism of the participants in the game a superseding cause of the pupil's injury. If the teacher's absence is negligence, and this question is one for the jury to decide, the fact that the pupil's conduct or the conduct of others in the game was also a substantial factor, does not excuse the teacher. A jury could find, the court said, that the teacher acted unreasonably in leaving his class unsupervised for a period of 25 minutes, particularly in view of testimony that the pupils were watching for the teacher and if he had looked in on the class, the rough game would have been stopped.

The court held further that under the comparative negligence statute, except in rare cases, it is a function of a jury and not that of a court to decide the apportionment of negligence. In this case, the court concluded, the question of the pupil's negligence was for the jury.

In rejecting defendants' contention that to permit recovery under the circumstances of this case would make them the insurer of the safety of Milwaukee school children, the court said that while it has recognized that a teacher is neither immune from liability, nor is he an insurer of his students' safety, he is liable for injuries resulting from his failure to exercise reasonable care.

RELIGION; SECTARIAN EDUCATION

New Hampshire

Opinion of the Justices
228 A. (2d) 161
Supreme Court of New Hampshire, April 6, 1967.

The New Hampshire State senate asked the state supreme court for an opinion on the constitutionality of three proposed bills.

A bill that would require some form of morning exercises left to the discretion of the teacher, who is authorized to include the use of the Lord's Prayer or other prayer of general use, and reading from the Holy Bible without comment, was held to be an unconstitutional violation of the establishment clause of the First Amendment.

Citing Abington v. Schempp, 374 U.S. 203, the court upheld the constitutionality of a bill to "require a period of silence for meditation in the first class each day in all public schools."

A bill to require a plaque with the words "IN GOD WE TRUST" in letters no less than three inches high to be prominently displayed in every classroom in the public education system would be constitutional, the court declared. Citing the concurring opinion in Engel v. Vitale, 370 U.S. 421, the court stated, "The words 'IN GOD WE TRUST' as a national motto appear on all coins and currency, on public buildings, and in our national anthem, and the appearance of these words as a motto on plaques in the public schools need not offend the Establishment Clause of the First Amendment."

New Jersey

Fox v. Board of Education of Township of West Milford
226 A. (2d) 471
Superior Court of New Jersey, Law Division, January 19, 1967.

(See page 57. Issue is bus transportation for parochial-school pupils.)

New York

Board of Education of Central School District No. 1, Town of East Greenbush et al. v. Allen
228 N.E. (2d) 791
Court of Appeals of New York, June 1, 1967.
Certiorari granted 88 S. Ct. 767, January 15, 1968.

(See Pupil's Day in Court: Review of 1966, p. 46.)

Several boards of education brought an action against the New York state commissioner of education to have declared unconstitutional a statute which would require school districts to purchase and lend textbooks free of charge upon individual request to students in grades 7 through 12 whether enrolled in a public, parochial, or private school.

The trial court ruled the school board has standing to sue, and held that the statute violated the establishment and free exercise clauses of the First Amendment to the Constitution of the United States and the state constitutional proscription of the use of public moneys "directly or indirectly, in aid of maintenance...of any school or institution of learning wholly or in part under the control or direction of any religious denomination...."

The lower appellate court reversed the decision on the ground that the school boards had no standing to bring this action.

On appeal to the state's highest court, the majority agreed that the school boards did have standing to bring the action. On the merits the constitutionality of the textbook loan statute was upheld.

The court refused to follow the reasoning of Judd v. Board of Education, an earlier New York case that had ruled busing of parochial-school students unconstitutional as an indirect aid to sectarian schools and stating that "the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such." The purpose of the textbook loan statute, the court said, belies any interpretation other than that the statute was meant to bestow a public benefit upon all children regardless of their school affiliation. There was no legislative intent to assist parochial schools as such and "any benefit accruing to those schools is a collateral effect of the statute, and cannot be properly classified as the giving of aid directly or indirectly."

Noting that only textbooks designated for use by public schools or approved by public school boards or school authorities may be lent, the court then compared the textbook loan statute to public libraries which allow students of both parochial and public schools to borrow books to complete assignments of "outside readings."

Having decided that the statute did not entail aid to the parochial schools, the court held that there is no federal constitutional question under the establishment clause of the First Amendment.

The Supreme Court of the United States granted a writ of certiorari for a review of this decision.

Note: On June 10, 1968, the Supreme Court upheld this decision. Applying the test set out in the 1963 Schempp decision (374 U.S. 203) that the law have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion" the Court ruled 6 to 3 that the statute requiring the loan of textbooks free of charge to pupils in parochial schools did not violate the establishment clause of the First Amendment. The Court concluded that the loan program was of financial benefit to the children and their parents and not to the sectarian schools (36 Law Week 4540).

Flast v. Gardner
267 F. Supp. 351
United States District Court, S.D. New York, April 27, 1967; 271 F. Supp. 1, June 17, 1967. Probable jurisdiction noted, Supreme Court of the United States, 88 S. Ct. 218, October 16, 1967.

Seven persons, as parents, voters, and taxpayers, brought suit against the Secretary of the U.S. Department of Health, Education, and Welfare, and the U.S. Commissioner of Education, seeking to enjoin the use of federal funds to finance instruction in reading, arithmetic, and other subjects in religious and sectarian schools, and for the purchase of textbooks and other instructional materials for use in such schools. Plaintiffs alleged that the defendants have been and are using these funds for these purposes in administering Titles I and II of the Elementary and Secondary Education Act of 1965; that this act does not authorize such federal expenditures, and if it does, the act must be struck down under the First Amendment as a "law respecting the establishment of religion" and as a "law...prohibiting the free exercise thereof."

Plaintiffs moved that a three-judge court be convened to hear the case, while defendants moved that the complaint be dismissed on grounds that plaintiffs lacked standing to sue under the holding of Frothingham v. Mellon, 43 S. Ct. 597 (1923). In that decision the Supreme Court held that a federal taxpayer, as such, cannot make a showing, necessary for obtaining judicial review of a statute, that "he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The federal judge held that the alleged injury was not merely and mainly economic loss, and the substantive issues raised by the plaintiffs under the First Amendment were not "plainly insubstantial" to warrant dismissal of the complaint by a single judge. Motion to convene a three-judge court was granted. (267 F. Supp. 351.)

Thereafter, a three-judge court held on authority of the Frothingham decision that the plaintiffs had no standing to bring this action to prevent the use of federal funds for religious schools, in that they have presented no justifiable controversy and, therefore, the court lacked jurisdiction over the subject matter. In reaching this conclusion, the court rejected plaintiffs' arguments that the decision in Frothingham establishes a rule of judicial self-restraint rather than a limitation on the jurisdiction of the federal courts under the Constitution. The court said the Frothingham decision is binding on it regardless of whether the decision states a constitutional principle or a rule of policy. Also rejected was plaintiffs' attempt to distinguish Frothingham on the grounds that the litigation in the instant case involves rights protected by the First Amendment. (271 F. Supp. 1.)

The Supreme Court of the United States accepted an appeal in this case.

Note: On June 10, 1968, the Supreme Court reversed this decision, ruling that a taxpayer has standing to attack the constitutionality of a federal statute on the grounds that it violates the religious clauses of the First Amendment. In raising the barrier of Frothingham v. Mellon against a taxpayer challenge of the expenditure of funds under a federal statute, the Court held that the taxpayer has standing consistent with Article III of the Constitution to invoke the federal judicial power when he alleges that Congressional action under the Taxing and Spending Clause is in derogation of those constitutional provisions--here the establishment clause of the First Amendment--which operate to restrain the taxing and spending power. The Court expressed no view on the merits of the substantive claims raised by the taxpayers, but said their complaint contained sufficient allegations under the criteria outlined in the opinion to give them standing to invoke the jurisdiction of a federal court for an adjudication of the merits. Flast v. Cohen (36 Law Week 4601).

Pare v. Donovan
281 N.Y.S. (2d) 884
Supreme Court of New York, Special Term, Kings County, Part I, June 30, 1967.

Parents of children attending public schools in New York City petitioned the court to direct the board of education, the principals, and teachers of the schools involved, the president of the United Parents Association of New York City, and others to discontinue the dissemination, distribution, or collection of information and petitions to pupils while in class or on school property which supports either the retention or the modification of the laws or the constitution of the state of New York.

The case arose when the teachers handed out to all the pupils one-page flyers prepared by the United Parents Association. One flyer was prepared in the form of a petition to be signed by the parents and returned to the school as a form of protest against a change in the state constitution which would allow the use of public funds for nonpublic schools. Another flyer urged all parents to write their elected state representatives to support various education bills, some of them involving the repeal of a bill allowing school districts $15 per pupil for the purchase of textbooks for students in both public and parochial schools.

The parents contended that the use of the children by public officials as instruments in the dissemination of political views violates the civil liberties of the children guaranteed to them by the First Amendment to the Constitution of the United States. The use of the schools for the dissemination of the flyers, they maintained, places a stamp of approval on them in the eyes of the parents and the children and intimidates them into conformity with the expressed views. It was claimed that this pressure or coercion infringed upon their freedom of speech and political thought, right to privacy, and freedom of religious belief.

The board of education and school personnel involved argued that the parents association provided opportunities for the parents and the school to get together to consider common educational goals and to attempt solutions to common problems. In this framework the board had cooperated with the parents associations in the distribution of their communications with the parents of students without endorsing the ideas and regardless of whether they coincided with those of the board.

Shortly after the flyers which gave rise to this case were distributed, the board amended its policy to allow cooperation in the distribution but not in the collection of parents association communications. It was further claimed that since cooperation in the distribution involved an administrative policy, the proper recourse is not to the court but to the state commissioner of education.

The court held that it had jurisdiction in the matter since the challenge to the administrative policy concerned a constitutional issue.

The court dismissed the charges of infringement upon First Amendment freedoms and declared: "Freedom of thought and expression of the speaker or writer is the concern of the First Amendment...and not the conditions under which the listener or reader receives the message even if the auditor fails to volunteer or consent to listen." The right to privacy may be protected "where an intrusion outrages or causes mental suffering, shame or humiliation to a person of ordinary sensibilities," but the court held that the "right to be free from partisan political propaganda" is not a right of privacy which is protected under the Constitution.

The court also dismissed petitioners' claim that the distribution of the circulars by school employees was in violation of a statute prohibiting civil servants from using official authority to coerce political action of any person or body. The word "coerce" was held to mean "force through punishment or a threat thereof," and such coercion did not exist in the present case.

Lastly, petitioners asserted that the school board and the parents association violated their educational guidelines against partisanship in association/school-board relationship, made the teachers violate established norms of ethical and professional behavior, and took unfair advantage of the teacher-pupil relationships. The court said these claims are grievances within an area of which the commissioner of education has exclusive jurisdiction under statute whereunder an aggrieved person may receive a review.

Ohio

Protestants and Other Americans United for Separation of Church and State v. United States
266 F. Supp. 473
United States District Court, Southern District of Ohio, Western Division, March 20, 1967.

Title II of the federal Elementary and Secondary Education Act authorizes the Commissioner of Education to make grants to states for the acquisition of school library resources, textbooks, and other printed instructional materials for use of children and teachers in both public and private elementary and secondary schools. A nonprofit corporation and 22 individuals sought to have enforcement of Title II of the Act declared unconstitutional, to have its enforcement enjoined, to have moneys already expended returned to the United States Treasury, and to recover damages on behalf of the individual plaintiffs.

The plaintiffs claimed standing to maintain the action not as taxpayers alone, but as individuals seeking redress of a grievance, "the use of public funds, resources and personnel...to establish a sectarian religion and inhibit the plaintiffs' freedom of religion."

The court held that the plaintiffs had no standing to maintain the action, and declared that the claims made here are the same as those raised in the leading case of Frothingham v. Mellon, 262 U.S. 447 (1923)--that "federal funds are being expended in an unconstitutional manner and such expenditures deplete the federal treasury to the ultimate detriment of the individual plaintiffs and all other persons similarly situated." The court quoted the Mellon case: "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Pennsylvania

Rhoades v. School District of Abington Township
226 A. (2d) 53
Supreme Court of Pennsylvania, January 17, 1967.

(See page 58. Issue is bus transportation for parochial-school pupils.)

TRANSPORTATION

New Jersey

Fox v. Board of Education of Township of West Milford
226 A. (2d) 471
Superior Court of New Jersey, Law Division,
January 19, 1967.

Citizens and taxpayers of West Milford Township instituted proceedings challenging the validity of two bus contracts awarded by the West Milford Board of Education for the free transportation of children to two private, nonprofit, parochial schools along specially established routes and the constitutionality of the enabling bus transportation statute.

In 1962, before the fall opening of its new high school, the board of education established transportation routes for the district's public schools. Previously the public high-school students were sent by bus to a school in an adjoining county. These buses went past or near the site of one of the parochial schools and were used by a large number of its pupils. With the opening of the new high school, the bus routes were redesigned, ultimately precipitating the controversy in question. Because of increasing public pressure, and pressure from the two parochial schools, the school board reversed its 1962 decision not to provide special bus service for the parochial schools and began providing special transportation for them.

Plaintiffs first contended that although the constitutionality of the bussing statute was upheld by the Supreme Court of the United States in Everson v. Board of Education of Ewing Township, 330 U. S. 1 (1947), the position is not the currently prevailing law "in view of later expressions of the Court in analogous determinations involving the First Amendment..." and that the present Supreme Court would strike down the Everson decision as unconstitutional.

After a lengthy discussion favoring the minority view in Everson, that "the church ultimately benefits from the assumption of transportation expense by the board of education and that benefit to the children or the degree of benefit to the church does not serve as a true measure of constitutionality," the court held itself bound by the Everson case.

As for the plaintiffs' second contention that the statute and the municipal action violate the state constitution, the court stated that the Everson case was controlling and upheld the statute. Further, action of the local school board pursuant to the statute does not violate the provisions of the state constitution.

The pivotal question before the court was whether the creation of bus routes designed solely for the pupils in the two parochial schools and the cost of the transportation at public expense was within the authorization of the statutory provision. The first paragraph of the statute allowed school boards to provide transportation to children in public and private nonprofit schools. The second paragraph read: "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such as is operated for profit in whole or in part."

Plaintiffs argued that the second paragraph limits the general power granted in the first paragraph so as to authorize provision for nonpublic-school children only where it is incidental to transportation of public-school children and between points along established public-school routes.

The school board asserted that the first paragraph of the statute grants discretionary power to create bus routes for nonpublic-school children which are not limited to existing public-school bus routes, and that the second paragraph makes it mandatory to provide services along established public-school routes.

Citing the legislative history of the statute, the court held that the creation of bus routes designed solely for nonpublic-school children without regard to the established public-school routes, and the expenditure of public funds for this purpose violated the legislative intent of the statute. Therefore, the bus contracts for the special transportation of the parochial-school children was illegal and void.

Pennsylvania

Rhoades v. School District of Abington Township
226 A. (2d) 53
Supreme Court of Pennsylvania, January 17, 1967.
Appeal dismissed, 88 S. Ct. 61, October 9, 1967.

Two suits, one against the Abington Township school district in Montgomery County, the other against the Rose Tree Union school district in Delaware County, consolidated for the purpose of this appeal, challenged the constitutionality of Act 91, passed by the Pennsylvania Legislature in 1965. This amendatory act to the school transportation statutes provided that when a school board provides for transportation of resident pupils to and from public schools, the board shall also make provision for free transportation over the established public-school bus routes of pupils who regularly attend nonpublic elementary and high schools not operated for profit. As expressed in its title, the purpose of the statute is to provide for the "health, welfare and safety of the children of the Commonwealth."

The plaintiffs asked the court to enjoin the school districts from providing the bus service at public expense to nonpublic-school pupils, including pupils attending Roman Catholic schools, on the grounds that the statute infringed the First Amendment of the federal Constitution; and that the statute also violated various provisions in the state constitution, among them a provision prohibiting appropriations to any denominational or sectarian institution, a provision barring the use of money raised for public schools for the support of any sectarian school, and a provision guaranteeing religious liberty and providing that no man be compelled to support a place of worship.

The Pennsylvania Supreme Court held 5 to 2 on authority of the Everson decision of the Supreme Court of the United States that Act 91 did not offend against the First and Fourteenth Amendments of the federal Constitution, saying that "Act 91 is public welfare legislation and, from the reservoir of public welfare, all races and religions may drink unimpededly in the quenching of normal thirst. Indeed one of the fundamental reasons for the state in a civilized society is to provide for public welfare."

In upholding the statute, the majority opinion in part states:

> Pennsylvania State laws compel all children up to 18 years of age to attend school--not public school, but any school so long as it teaches an approved curriculum and meets other State requirements. The State awards to nonpublic school students the same scholastic credits as those which are earned by public school students. It would be grossly illogical, therefore, to say that the State which does not differentiate between public and nonpublic pupils, so far as grades, promotion, and graduation are concerned, cleaves a line of distinction between them according to whether they arrive at the school on school buses, in private motor cars or on foot.
>
> Not only do law and reason refute any such differentiation, but economics and good government dispels the concept....
>
> The Public School Code provides for children, without distinguishing between public and nonpublic schools, many facilities, as for instance, medical, dental and nurse services...; driver safety...; food and milk supply....
>
> On the basis of logic and sustained reasoning it would be absurd to allow nonpublic school children into all these public services but deny them a ride on a bus to attend a school conforming to the requirements of the State educational program.

The court rejected plaintiffs' arguments that the challenged statute violated state constitutional provisions. Providing free bus transportation to parochial-school pupils, in the opinion of the court, neither supported a place of worship nor violated the prohibition against appropriations to any denominational or sectarian school. The court said, "The school buses under Act 91 operated for the benefit of the children who ride them and not for the benefit of the church which may be associated with the school in which the children receive a State-supervised education."

The Supreme Court of the United States dismissed an appeal from this decision for want of a substantial federal question.

MISCELLANEOUS

California

Goldberg v. Regents of the University of California
57 Cal. Rptr. 463
Court of Appeal of California, First District, Division 2, February 28, 1967. Hearing denied, California Supreme Court, April 26, 1967.

Four former students at the Berkeley campus of the University of California challenged their suspension and dismissal from the university in April 1965 and sought a court order directing their reinstatement. They contended that the disciplinary action was an unconstitutional limitation on their First Amendment rights of free speech and assembly, that it was taken pursuant to a constitutionally vague university regulation, thus depriving them of procedural due process.

The facts in this case related to conduct on campus, expressing criticism and disapproval by highly visible and provocative means. These students had participated in campus protest rallies following the arrest of a nonstudent for carrying a sign with offensive language; three of the students were also arrested and charged with violating the obscenity statutes and disturbing the peace on the basis of the same facts that lead to the university disciplinary proceedings that were started and completed while the criminal charges were still pending.

The four students were notified in writing of being charged with violating the university-wide policy on student conduct and discipline, and that an Ad Hoc Committee was appointed to hear the matter. Hearings were subsequently held at which the students appeared and were represented by counsel and presented witnesses in their behalf. The committee made separate findings of fact as to each of the four students, found the charges to be proved, and concluded that they had engaged in a clear pattern of coordinated activity that had as one of its purposes a test of the university reaction. Whether motivated by social protest or not, the committee unanimously agreed that the loud use and prominent display of the obscene words in the student union plaza violated the university regulation. The disciplinary measures recommended varied according to the seriousness of the individual offenses. Three of the students were suspended, one until June 1965, and the other two until September 1965. One student was dismissed. The acting chancellor at the Berkeley campus and the university president reviewed but would not interfere with the disciplinary action imposed.

In setting the framework for the decision, the court stated that the function of the university is to impart learning and to advance the boundaries of knowledge, and this function carries with it the administrative responsibility to control and regulate student behavior which tends to interfere with the achievement of these educational goals. Therefore, the university has the power to promulgate and enforce rules of student conduct that are appropriate and necessary to maintain order and propriety, considering the accepted norms of social behavior in the community, where such rules are reasonably necessary to further the university's educational goals.

Thus, the question presented was whether the university's requirement that the students conform to the community's accepted norms of propriety with respect to loud and repeated public use of certain terms was reasonably necessary in furthering the university's educational aims.

The court held that the university's disciplinary action in this case was a proper exercise of its inherent general powers to maintain order on the campus and to exclude therefrom those who are detrimental to its well being. In so deciding, the court said that the irresponsible activities of the four students seriously interfered with the university's interest in preserving proper decorum in campus assemblages. In the words of the court, "Conduct involving rowdiness, rioting, destruction of property, the reckless display of impropriety or any unjustifiable disturbance of the public order on or off campus is indefensible whether it is incident to an athletic event, the advent of spring, or devotion, however sincere to some cause or ideal."

The court rejected the students' contention that the hearing procedure adopted by the university deprived them of procedural due process. The court found that the students had received proper advance notice of the hearing specifying the charges, were accorded the right of representation by counsel, opportunity to hear, observe, and cross-examine witnesses, and to present their own defense. Nor were the students deprived of procedural due process because the committee did not follow the rules of evidence usually applicable in judicial proceedings, chose not to recognize the privilege against self-incrimination, and failed to hear a tape recording taken at the rally. Also found unacceptable by the court was the contention that where certain conduct is violative of both rules and regulations of the university and state statutes, that the discipline imposed by the academic community must await the outcome of the other proceedings.

The court concluded that upon application of all pertinent constitutional standards, the students' complaint did not state a cause of action on any theory. Judgment dismissing the complaint was affirmed.

Colorado

Flemming v. Adams
377 F. (2d) 975
United States Court of Appeals, Tenth Circuit, May 12, 1967.

(See Pupil's Day in Court: Review of 1966, p. 53; Review of 1965, p. 73.)

A 15-year-old girl brought suit through her mother against the Colorado State Board of Education and others seeking compensatory and exemplary damages for alleged deprivation of rights under the Constitution of the United States.

At the age of 15, the girl suffered certain physical disabilities which prevented her from attending the public junior high school where she had been a student. She was advised that she could apply for the special education services provided by the state for the handicapped. A state law required that all children applying for the services must "undergo physical and psychological examination by state accredited personnel" to determine not only the eligibility of the child but whether the child would derive a benefit from the program.

The state board promulgated a rule that eligibility must be certified by "a physician licensed to practice medicine in Colorado." The statutory term "accredited personnel" was thus construed by the board to mean physician. Since this student's application bore a certificate of eligibility signed by a chiropractor, the board refused to approve the application.

In a suit filed in a state court seeking an order compelling the state board to approve the application, the state supreme court held that the phrase, "state accredited personnel," referred to all persons licensed in Colorado to practice the healing arts and, therefore, applied to chiropractors. Under this statutory interpretation, the board's rule was held to be inconsistent with the statute, and the state court ordered the board to process the girl's application for special education services.

Thereafter, the student filed the present civil rights action for damages, alleging that the defendants, members of the state board of education, the commissioner of education, and the special education consultant deprived her of an education secured by the Constitution of the United States. A second count alleged that the defendants conspired to deny her equal protection of the laws. The federal district court granted the defendants' motion to dismiss on the ground that no deprivation of any Constitutional rights had been shown because the right to an education is not guaranteed under the federal Constitution. An appeal was taken.

The appellate court affirmed the decision and said, "The U.S. Constitution does not secure to the [student] the right to an education; rather the Constitution secures the [student's] right to equal treatment where the state has undertaken to provide public education to the persons within its borders."

The state of Colorado has undertaken to provide special education services for the handicapped, and in the court's opinion, "it is manifest that the Board's rule [that eligibility for special education services be certified by a physician licensed to practice medicine] was promulgated in good faith and was applied equally to all applicants until the state supreme court ruled that the Board had misconstrued the statute." The board merely sought to carry out its governmental duty to administer the special education program and did not seek to harm the student or to promote any form of unconstitutional discrimination.

Indiana

Copeland v. South Bend Community School Corporation
376 F. (2d) 585
United States Court of Appeals, Seventh Circuit, May 8, 1967.

(See page 28.)

Iowa

Board of Directors of Independent School District of Waterloo v. Green
147 N.W. (2d) 854
Supreme Court of Iowa, January 10, 1967.

A school board promulgated a rule barring married pupils from participating in extracurricular activities. A high-school pupil, knowing the rule, was married over the summer before his senior year. He was informed that because of his marriage he would be ineligible to participate in varsity basketball during the forthcoming year. The pupil brought suit to enjoin enforcement of the rule on the ground that the rule was arbitrary, unreasonable, and unauthorized.

The court held the board rule to be reasonable and valid. In so holding, the court observed that school boards are charged with operating public schools, and, to this end, they are permitted to formulate rules for their own government and that of all pupils. While school boards may not govern or control individual conduct of pupils wholly outside the school room, pupils' conduct directly relating to and affecting the schools' management and efficiency may be regulated by school authorities.

The court found that the school board had not acted unreasonably or arbitrarily in concluding that marriage by high-school students is a contributing factor in connection with the school dropout problem, which, with other circumstances attendant upon marriage, interferes with and creates difficulties in the administration of school affairs. Under these circumstances, the school board had sufficient reasonable cause to adopt the rule barring married pupils from extracurricular activities. Nor was the rule violative of public policy in penalizing persons because of marriage, nor did it deny any pupil equal protection of the law.

Tinker v. Des Moines Independent Community School District
383 F. (2d) 988
United States Court of Appeals, Eighth Circuit, November 3, 1967.
Certiorari granted, 88 S. Ct. 1050, March 4, 1968.

(See Pupil's Day in Court: Review of 1966, p. 54)

Students in the Des Moines Independent Community School District were suspended from school for wearing arm bands protesting the Viet Nam War in violation of a school regulation proscribing the wearing of such arm bands. Their suit for injunction against the school district and its officers to prohibit them from suspending students under authority of the aforesaid school regulation and for nominal damages was dismissed by the lower court.

An equally divided appellate court affirmed the decision without opinion.

The Supreme Court of the United States granted the students a petition for a writ of certiorari for a review of this decision.

Louisiana

Davis v. Firment
269 F. Supp. 524
United States District Court, Eastern District, Louisiana, New Orleans Division, June 13, 1967.

(See page 9. Case involves school-board regulation against extreme haircuts.)

New York

Fitzpatrick v. Board of Education of Central School District No. 2 of the Town of St. Johnsville
284 N.Y.S. (2d) 590
Supreme Court of New York, Montgomery County, October 19, 1967.

Parents sought an order rescinding and annulling the suspension of their children from school. When the school board passed a resolution prohibiting the students from leaving the school grounds during lunch recess and requiring them to eat in the cafeteria, the parents sought permission for their children to eat at home. The school board agreed so long as a parent accompanied them to and from the school. Later the parents stopped accompanying the students, and the board thereafter suspended the children.

The parents contended that the rules promulgated by the board were arbitrary, capricious, and unreasonable, and therefore, unconstitutional and illegal.

The board contended that the staggered lunch hour system, necessitated by the addition of courses to the curriculum, would result in constant disturbance of the classes in session if some students were allowed to leave the school grounds.

The court held the school board has the authority to adopt rules necessary to ordinary and efficient operation of the school system, and that the court should not interfere even if it may disagree with the particular rule or regulation "unless it is obviously capricious or arbitrary." A presumption exists that the rules are reasonable and necessary. On the record, the court upheld the school board, for it could not be said that the rules in this case were "not necessary and helpful to the orderly operation of the school." Therefore, the parents' motion was denied.

Goldwyn v. Allen
281 N.Y.S. (2d) 899
Supreme Court of New York, Special Term, Queens County, Part I, June 23, 1967.

While taking a State Regents Examination, it appeared to a proctor that a senior high-school student was copying from a piece of scrap paper. The proctor confiscated the paper, and at the end of the examination, the student was taken to the office of the acting principal for questioning. The student was in a highly excited, emotional state and in tears during the inquiry. After first denying in writing that the paper was brought into the test room, the girl finally "confessed" in writing to the act. She recanted the "confession" the next day. The acting principal notified the state department of education by letter and received a return letter advising of the suspension of the student's Regents Examination privileges, including the Regents Scholarship and College Qualification Test.

In a letter a few days later, counsel for the girl complained to the board of education that sanctions had been imposed upon his client without "even the semblance of a hearing." In reply, the board suggested a conference, inviting the attorney "as an observer only." Despite his objections, the counsel was not permitted to participate at the conference. The girl and her parents did not attend on advice of counsel, and subsequently the assistant superintendent concurred in the decision of the acting principal.

The court granted the petition of the student to reinstate her state examination privileges and to expunge "from the records of the Commissioner of Education and Flushing High School all reference to a finding of fraud allegedly committed...."

The issue of the lack of counsel at the conference called by the assistant superintendent does not go to the heart of the matter, the court said, since the conference was not authorized by the commissioner's regulations and could not have effected a removal of sanctions. The court considered the central issue to be whether the Department of Education violated a right of the student by acting upon the letter of the acting principal. Citing recent New York and Supreme Court of the United States cases holding that procedural due process must be accorded a minor charged with juvenile delinquency before a juvenile or family court, the court declared that it saw "no reason why such fair treatment should not be afforded an infant at the hands of an administrative body where serious and stringent sanctions may be imposed." In the present case, the sanctions result in the student's not obtaining a state diploma.

In view of the severity of the sanctions involved, the court concluded that "the Department of Education deprived [the student] of her rights by imposing sanctions predicated solely on the letter of the acting principal without a hearing to ascertain the truth of the charges at which she might defend herself with the assistance of counsel."

Madera v. Board of Education of City of New York
267 F. Supp. 356
United States District Court, Southern District of New York, April 10, 1967.

A student was placed on suspension by his school principal who notified his parents of a "guidance conference" to be conducted by the district superintendent. The parents were informed that a Spanish-speaking interpreter would be present and that they might also bring an interpreter of their own choosing. The purpose of the conference was to provide an opportunity for parents, teachers, counselors, supervisors, and others, to plan educationally for the benefit of the child. Also in attendance at these conferences would be a school-court coordinator who would act as a sort of liaison with the Family Court.

When the parents notified the superintendent of their intention to bring their attorney, they were informed that board of education regulations did not allow attorneys seeking to represent the parents or child to participate. The parents claimed that the regulation denying the participation of their attorney violated the due process clause of the Fourteenth Amendment. Their argument was based on the fact that among the decisions which the district superintendent might reach were that the child might be transferred to a school for socially maladjusted children or refer the case to the Bureau of Child Guidance or other social agency "for study and recommendation, including medical suspension, home instruction, or exemption." Exemption is defined as "the withdrawal of a child's right to attend a public school." If the parent refuses to follow the recommendation of the Bureau of Child Guidance that the child be placed in an institution, the matter is referred to the Bureau of Attendance which petitions the Family Court. The court may then either find the parent in violation of a duty to see to the child's attendance in school or the child may be found in violation of his duty to attend.

The court held the regulation barring attorneys from the guidance conference violated the due process clause of the Fourteenth Amendment and, therefore, was unconstitutional. The court concluded that the enforcement by the school authorities of the "no attorneys provision" deprived the child and his parents of their right to a hearing in a state-initiated proceeding which put in jeopardy the child's liberty and right to attend the public schools. Due process requires the right to be heard through counsel. It involves "the rudiments of fair play."

Note: This decision was reversed on appeal. The appellate court held that the school-board provision against the presence of an attorney to represent the pupil in the guidance conference did not deprive the pupil of due process under the Fourteenth Amendment. (386 F. (2d) 778, December 6, 1967.)

Ohio

State ex rel. Evans v. Fry
230 N.E. (2d) 363
Court of Common Pleas of Ohio, Stark County, September 1, 1967.

High-school students sought a court order requiring the superintendent of schools and the athletic director to allow them to participate in the high-school athletic program.

The petition was dismissed. Reasonable rules and regulations, the court declared, must be adopted in order to operate the schools in an orderly manner. "It is the responsibility of the Board of Education, through its athletic director to decide who may participate in athletic competition. A pupil may participate in athletic competition, but subject to the rules and regulations prescribed by the Board of Education."

In the absence of proof of a gross abuse of discretion, no court can control the discretion vested in the Board of Education. The court found nothing in the facts alleged in this case which could be considered an abuse of discretion.

Texas

Cornette v. Aldridge
408 S.W. (2d) 935
Court of Civil Appeals of Texas, November 7, 1966; rehearing denied, December 12, 1966.

A student at West Texas State University, already under disciplinary punishment for violating campus rules against possessing or drinking intoxicants, was placed on probation after speeding at over 60 miles an hour in a 20-mile an hour zone on a campus street where other students were crossing. The speeding occurred after he had been drinking. The speeding was a violation of the university rules, and out of keeping with the requirements that student conduct should "conform to the high standards of adult behavior, both on and off the campus." As a condition of his probation, the student was forbidden to drive his car or any other car on campus or in the city during the period of probation. The day after being placed on probation, the student was apprehended by a city patrolman for driving his car at excessive speed. After being brought before the school disciplinary committee and given an opportunity to state his case, the student was suspended indefinitely by unanimous vote of the committee.

The student instituted a suit asking the court to issue an order directing the university authorities to recognize him as a student and permit him to attend the classes for which he was registered. He contended that the officials acted unreasonably, arbitrarily, and capriciously in suspending him. The trial court granted the writ requested. On appeal, the judgment was reversed.

The court held that the officials of the university, in the exercise of the discretion vested in them to control and manage the university and to establish such rules and regulations as shall be deemed necessary for its efficient administration, had the authority to invoke the indefinite suspension of the student. In the circumstances, the school officials did not act in an unreasonable, arbitrary, or capricious manner, but to the contrary, showed considerable restraint in dealing with this student who was obviously unmindful of the rules of the university.

Ferrell v. Dallas Independent School District
261 F. Supp. 545
United States District Court, N.D. Texas, Dallas Division, December 9, 1966.

(See page 13. Case involves denial of admission to school of three students because of their "Beatle" style hair.)

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